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NO. VII.

On the Constitutionality of the Embargo Laws.

UNITED STATES.

MASSACHUSETTS DISTRICT.

DISTRICT COURT AT SALEM, SEPTEMBER TERM, A. D. 1808.

United States, by Joseph Wilson, Collector of Marblehead,

VS.

The brigantine William—Benjamin Ireson & al. Claimants.

DAVIS, *Dist. J.* This libel is founded on the act of congress, passed 22d December, 1807, intitled, "An act laying an embargo on all ships and vessels in the ports and harbors of the *United States*," and on the first supplementary act, passed January 9th, 1808.

The libel alleges, that sundry enumerated goods, wares and merchandize, on the 17th day of March last, on the high seas, were put, from said brigantine, on board another vessel, called the *Nancy;* and also, that other goods, wares and merchandize, on the 11th day of *May* last, at *Lynn*, in said district, were put, from said *brigantine*, on board another vessel, called the *Mary*, with intent, that said goods, wares and merchandize should be transported to some foreign port

or place, contrary to the acts aforesaid, by which, it is alleged, that said *brigantine* is forfeited.

It has been contended, by the counsel for the claimants,

1st. That the facts, appearing in evidence, do not present a case, within the true intent and meaning of the acts aforesaid.

2d. That the acts, on which a forfeiture is claimed, are unconstitutional.

After argument, on these heads, it is suggested, by the counsel for the claimants, that the case may receive material elucidations from the facts that will appear, on the trial of the brigantine *Nancy;* and they pray for a postponement of a decision on this libel, until a hearing shall be had, relative to that vessel. As that case is necessarily continued, and as that of the *Sukey*, also pending at this term, appears to have connexion with the transactions in the case of the *William*, I shall not make up a judgment relative to the *facts* on this libel, until those of the *Nancy* and *Sukey* shall have been tried, or until the further evidence suggested, shall have been heard. But it appears to be necessary to declare an opinion on the constitutional question, which has been so fully discussed, especially as the objection, if available, equally applies to many other cases before the court. Under these circumstances, I have considered it expedient, and indeed an incumbent duty, to give an opinion on this great and interesting question; though an entire decision on the case, in which it was presented and argued, is, for the reasons suggested, postponed.

In considering the several acts, relative to the embargo, as one system, it may be convenient to exhibit an analysis of their contents.

The general, or primary, provisions are contained in the first act, passed *December* 22, 1807; which lays "An Embargo on all ships and vessels in the ports and places, within the limits and jurisdiction of the *United States*, cleared or not cleared, bound to any foreign port or place;" and in the fourth section of the third additional act, passed *March* 12th,

1808, which prohibits the exportation, from the *United States*, in any manner whatever, either by land or water, of any goods, wares or merchandise, of foreign, or domestic, growth or manufacture. To the same head belongs the prohibition of the exportation of specie, by any foreign ship or vessel, by section 5th, of the first supplementary act.

The exceptions to these prohibitions are,

1st. Vessels under the immediate direction of the president of the *United States*.

2d. Foreign ships or vessels, either in ballast, or with goods wares and merchandise on board, when notified of the first act.

3d. Armed vessels, possessing public commissions, from any foreign power, not including in this description, privateers, letters of marque, or other private armed vessels.

4th. Vessels licensed for the fisheries, or bound on a whaling voyage, with no other cargo than sea stores, salt, and the usual fishing tackling and apparel.

5th. Vessels dispatched in ballast, under permission from the president of the *United States*, to import, from abroad, property from any citizen, which was actually without the jurisdiction of the *United States*, prior to the 22d *December*, 1807.

The remaining provisions, in the several acts, are merely auxiliary, and appear intended more effectually to ensure the execution of the primary prohibitions.

The first act is without limitation, and the several supplementary acts are to exist, during the continuance of the first.

A separate act, passed *April* 22d, 1808, authorises the president of the *United States* to suspend the operation of the act laying an embargo, and the several supplementary acts, " in the event of such peace, or suspension of hostilities, between the belligerent powers of Europe, or of any changes in their measures, affecting neutral commerce, as may render that of the *United States* safe, in the judgment of the president"—with a *proviso*, that such suspension shall

not extend beyond twenty days, after the next meeting of congress.

My views of the constitutional question, which has been raised in this case, will be confined to the acts relative to navigation, and to exportation by sea. On those, only, do the cases before the court depend; and it is obviously incumbent on a judge to confine himself to the actual case, presented for trial, and its inseparable incidents, and to avoid pronouncing premature decisions on extraneous questions.

The prohibition of exportation by *land*, can, properly, come into view, only as it may tend to explain those provisions, on which I am called to decide, and to indicate their character.

In the whole course of the interesting argument on this great question, and in all my reflections upon the subject, I have been deeply sensible of the solemn weight and magnitude of the inquiry. The unusual press of business, at this term, and the application of the recent acts to the numerous cases presented for trial, must have given full occupation to the mind, if supposed to be solicitous for a correct discharge of duty; and I could have wished, that this paramount question of constitutionality, when gentlemen had determined to rely on it, should have been reserved for the higher tribunals of the nation. But, on this subject, it was not for me to choose. A comparison of the law with the constitution is the right of the citizen. Those who deny this right, and the duty of the court resulting from it, must regard with strange indifference, a precious security to the individual, and have studied, to little profit, the peculiar genius and structure of our limited government.

Objections to an act of congress, on the ground of constitutionality, may be referred to the following heads.

1. A repugnancy to some of the exceptions or restrictions to the legislative authority, expressed in the constitution of the *United States*.

2. A repugnancy to some of the affirmative provisions, in the constitution.

3. A want of conformity to the powers vested in the legislature, by the constitution; or that the act in question is not authorised by any of those powers.

As an instance under the *first* head, we may suppose an act, contravening the restrictive clause in the constitution, "No bill of attainder or *ex post facto* law shall be passed." An act repugnant to the declaration that, "the trial of all crimes, except in cases of impeachment, shall be by jury," would afford an example under the *second* head. Contraventions of this description, when clearly described and determined, could be of no legal effect; and it would appear to be the duty of the national courts, conformably to their specified authority by the constitution, and pursuant to the oath of office, to regard the acts, containing such repugnancies, to be so far void.

It does not appear, nor is it, as I recollect, contended, that the acts under consideration, are liable to objections of this description. They *contravene* none of the *exceptions* or *restrictions*, expressed in the constitution, nor is it made to appear, that they are *repugnant* to any of its *affirmative declarations*. At least, this is true of the *primary provisions*. If any of the *auxiliary regulations*, in the supplementary acts, applying to the coasting trade, are liable to objections of this nature, they will be separately considered. Some of those regulations, it is argued, contravene that restriction on the powers of congress, which provides, that "vessels bound to, or from, one state, shall not be obliged to enter, clear, or pay duties in another." If this objection be available, it equally applies to the regulations in the coasting act, early adopted after the organization of the government; and which have since been in uniform operation, without meeting an objection of this sort. There is a degree of ambiguity in the expression, which seems to countenance the construction suggested in the argument; but the true construction avoids the objection. It was intended, as I understand it, to prevent vessels bound to, or from, a port, in any state, being obliged to enter, clear, or pay duties in any state, other than that, to, or from which, they should be proceed-

ing. One of the amendments, proposed by the state of *North Carolina*, suggests the following substitute for the clause we are now considering. "Nor shall vessels, bound *to a particular state*, be obliged to enter or pay duties *in any other;* nor, when bound *from any one of the states*, be obliged to *clear in another.*" This reading would give a clearer expression of, what must be considered, the true meaning of the clause as it now stands.

The objections, on the ground of unconstitutionality, to the acts in question, are thus limited to the *third* head; a defect of constitutional power, in the congress of the *United States*, to enact them. On this ground has the argument proceeded, and it is contended, that congress have not power or authority, by the constitution of the *United States* thus to interdict commercial intercourse with foreign nations.

On this head, a preliminary inquiry, of material importance, presents. What is the power or authority of the court, relative to an objection of this description? Or, in other words, is a mere exceeding of the powers of congress, in legislation, without a repugnancy to express provisions of the constitution, among the proper objects of cognizance in the federal judiciary?

In the consideration of this preliminary question, I shall first recur to judicial determinations and opinions for light and guidance.

In the year 1792, congress passed an act, relative to the claims of invalids, for pensions, which required the intervention, in a qualified manner, of the Circuit Courts. The judges of three of the Circuit Courts declined the execution of the act, and assigned their reasons, to the President of the *United States*.

The objections were, that the business, assigned to the courts by the act, was not of a judicial nature; and that their judgments, or opinions, (which they considered as judgments) were, by the act, subjected to revision and controul by the legislature, and by an officer of the executive department.

Though they declined acting as *courts* under the act, they expressed a willingness, for the accommodation of applicants, to consider themselves as *commissioners;* but congress, at a subsequent session, repealed the objectionable clauses, and made other provision, for determining the claims of applicants for pensions. 2 *Dallas* 410.

In the case of *Vanhorne's lesse* vs. *Dorrance*, in the Circuit Court of *Pennsylvania*, *April* term 1795, (2 *Dallas* 304,) Judge *Paterson* pronounced an act of *Pennsylvania*, called, the *quieting and confirming act*, to be null and void, as repugnant to the constitution of that state.

In the supreme court of the *United States*, *February* term 1796, in the case of *Hylton*, plaintiff in error, vs. *the United States*, the constitutionality of the act, "laying duties on carriages," was discussed and determined.

The point, in controversy, depended on the meaning of the terms *direct tax*, in the constitution.

It was contended, by the counsel for the plaintiff in error, that the tax on carriages was a *direct tax*, and, not being laid according to the *census*, as direct taxes are, by the constitution, required to be laid, that the law was void.

The court were, unanimously, of opinion, that the tax on carriages was not a *direct tax;* of course, the question of the validity of an act, repugnant to an express clause in the constitution, was not determined. Judge *Paterson*, however, gave his opinion, on this point. "If it be a *direct tax*, it is unconstitutional; because it has been laid pursuant to the rule of *uniformity*, and not to the rule of *apportionment.*"

Judge *Chase* observed, "as I do not think the tax on carriages is a *direct tax*, it is unnecessary, at this time, for me to determine, whether the court constitutionally possesses the power to declare an act of congress void, on the ground of its being made contrary to, or in violation of the constitution; but if the court have such power, I am free to declare, that I will never exercise it but in a *very clear case.*"

Justices *Iredell*, *Wilson* and *Cushing* all concurred with their associates, that the tax on carriages was not a *direct tax*, but gave no intimation of their opinions, if it had been of that denomination. 3 *Dallas*, 171.

In the same Court, August Term, 1798, in the action *Calder* and wife vs. *Bull* and wife, (3 *Dallas* 386,) the question was, as to the validity of an act of the legislature of Connecticut, setting aside a decree of a court of probate, and granting a new hearing. It was contended, that it was an *ex post facto* law, and, as such, prohibited by the constitution of the United States.

The court were of opinion, that the law in question was not an *ex post facto* law, and, of course, there was no contravention of the constitution.

Judge *Chase* avoided giving an opinion, whether the Court had jurisdiction to decide, that any law made by Congress, contrary to the Constitution of the United States, be void.

Judge *Iredell* was more explicit. " It has been the policy" said he " of all the *American* states, which have individually framed their state constitutions, since the revolution, and of the people of the *United States*, when they framed the Federal Constitution, to define, with precision, the objects of the legislative power, and to restrain its exercise, within marked and settled boundaries. If any act of congress, or of the legislature of a state, *violates those constitutional provisions*, it is unquestionably void; though, I admit, that, as the authority to declare it void, is of a delicate and awful nature, the court will never resort to that authority, but in a clear and urgent case."

The last case, which I shall cite, is *Calender's* trial, in the Circuit Court in *Virginia*, *May* term 1800, on the additional act " for the punishment of certain crimes against the *United States*," commonly called the *sedition law*.

The counsel for the traverser offered to argue to the jury, that the law was unconstitutional. In overruling this motion, and in assigning his reasons, Judge *Chase* made the following observations, which appear to be pertinent to the present inquiry.

" No citizen of knowledge and information, unless under the influence of passion or prejudice, will believe, without very strong and indubitable proof, that congress will, *intentionally*, make any known violation of the federal constitution and their sacred trust. I admit, that the constitution contemplates that congress may, from inattention, or error in judgment, pass a law *prohibited* by the constitution, and, therefore, it has provided a peaceable, safe and adequate remedy. If such a case should happen, the mode of redress is pointed out in the constitution, and no other mode can be adopted, without a manifest infraction of it. Every man must admit, that the power of deciding the constitutionality of any law of the *United States*, (or of any particular state) is one of the greatest and most important powers the people could grant. Such power is restrictive of the legislative power of the Union, and also of the several states, not absolute and unlimited, but confined to such cases only, where the law in question shall clearly appear to have been *prohibited* by the federal constitution, and not in any doubtful case."

The immediate question that the learned judge was then considering, was, whether the power of determining the constitutionality of the law belonged, exclusively, to the *court*, or whether it could be rightfully exercised by a *jury*. His remaining observations, appearing in the published account of the trial, more especially apply to that question.

None of these cases decide the point now under consideration. By one of them, we have a decision against a *state* law, produced as a ground of title, as being *repugnant* to the constitution of the state. In another, we have the opinion of Judge *Paterson*, that a law of the *United States*, would, upon a certain construction, be repugnant to the constitution, and void. In the *Connecticut* case, we have Judge *Iredell's*, opinion, that an act of congress, or of the legislature of any state, may be declared void by the court, if it *violate constitutional provisions*. Judge *Chase*, in those cases, speaks with great caution, on this head, it not being necessary to de-

cide the point. In *Callender's* trial he is more explicit; and I understand him to admit the power of the court to disregard a statute, *repugnant* to the *restrictions*, in the constitution, on the authority of congress, and on that of the state legislatures. In none of the cases have we a decision, nor an opinion, as to the power of the court, where the objection to a statute is grounded, not on a *repugnancy to express provisions*, but on a supposed undue *extension* of a *given power*.

The first case is of a peculiar nature, and no conclusive inference can be drawn from it, of the opinion of the court, relative to the point now under consideration. The law was not declared void, but the court declined acting upon it, except in a qualified manner, as commissioners. Their views and determinations on the subject, have reference to the nature of the judicial authority, and to the preservation of their constitutional independency, against encroachment.*

* Since this opinion was pronounced, it has been perceived, that two other cases should have been noticed, both of them in affirmance of the general doctrine, exhibited in the cases cited in the text.

Cooper vs. *Telfair*, 4 *Dallas* 14. This case was in the Supreme Court of the *United States*, *February* term 1800, in error, from the Circuit Court for the district of *Georgia*. An act of attainder and confiscation of the state of *Georgia*, passed *May* 1782, was pleaded in bar of the plaintiff's demand. In the replication, were set forth several articles of the constitution of that state, one of which requires, that " all matters of breach of the peace, felony, murder and treason against the state" shall be *tried in the county* where the crime may have been committed. The other articles, specified in the replication, relate to the separation of the legislative, executive and judiciary departments—the principles of the *habeas corpus* act—freedom of the press—trial by jury —and the confinement of the legislature, in making laws, to such, as should not be repugnant to the true intent and meaning of any rule or regulation, contained in the constitution. It was contended, that the act of attainder and confiscation was repugnant to the constitution of *Georgia*, and void. The court were unanimously of opinion, that the act was not repugnant to the constitution, and affirmed the judgment of the Circuit Court, which was for the defendant, who was sued on the confiscated demand.

Washington, *Justice*, observed. " The constitution of *Georgia*, does not expressly interdict the passing of an act of attainder

Finding no direct judicial authortiy on the point, I shall next adduce opinions and reasonings from a less authoritative source, but still highly respectable.

It is observed, by an eminent juridical writer, that "the scrupulous dignity of the law of England has not been accustomed to receive as authorities, any thing less than the opinions delivered by judges on the bench." [*Reeves' Law of Shipping.*] This is doubtless a discreet and laudable reserve; and, most commonly, a strict adherence to the rule would still leave open to the inquirer, abundant means for a correct and satisfactory conclusion. But, in a case of this description, out of the ordinary range of legal discussion, we are compelled to resort to other sources; and the counsel

and confiscation, by the authority of the legislature"—"If the plaintiff in error had shown that the offence, with which he was charged, had been committed in any *county of Georgia*, he might have raised the question of conflict and collision between the constitution and the law; but, as that fact does not appear, there is no ground, on which I could be prepared to say, that the law is void. The presumption, indeed, must always be in favour of the validity of laws, if the contrary is not clearly demonstrated.

Judge Chase was of the same opinion, and for the same reason. He intimates, at the same time, his opinion of the validity of the law, on other grounds, and expresses a doubt, whether the power of the court, to declare an act void, can be employed to invalidate laws, enacted previous to the existence of the constitution of the *United States.*

Judges Paterson and Cushing considered the act within the power of the legislature, there being no express provision in the constitution, devesting or transferring it; and the offender being beyond the reach of judicial process, when the law was enacted. "The constitutions of several of the other states," said judge *Paterson*, "contain the same general principles and restrictions; but it was never imagined that they applied to a case like the present; and, to authorize this court to pronounce any law void, *it must be a clear and unequivocal breach of the constitution, not a doubtful and argumentative implication.*"

In *Marbury* vs. *Madison*, in the same court, *February* 1803, the act of congress, authorising the Supreme Court to issue *writs of mandamus*, was considered as void, so far as it was repugnant to the specification of cases in the constitution, to which the *original jurisdiction* of that court is limited. The illustrative cases, supposed by the court, in their opinion, as pronounced by Chief Justice *Marshal*, are of similar description. 1 *Cranch* 137.

on both sides have found it necessary, or convenient, to derive confirmation or illustration of their positions, from books and treatises, seldom seen or mentioned at the bar.

The work to which I shall refer, is that admirable commentary on the constitution of the United States, intitled, "*The Federalist*," the author of which is pronounced by one of our learned Judges, to be superior to *Blackstone*, or his successor *Woodeson*, for extensive and accurate knowledge of the true principles of government.* If we love and cherish that constitution, we shall highly esteem this excellent commentary on that precious instrument. If that great political temple command our admiration, we shall follow, with improvement and delight, this luminous guide, through all its fair apartments.

In the eighty third number, after observing, that the power of congress extends only to certain enumerated cases, and, that this specification excludes all pretensions to general legislative power, or authority, the writer proceeds; "In like manner, the judicial authority of the federal judicatures is declared, by the constitution, to comprehend *cases particularly specified.* The expression of those cases marks the precise limits, beyond which the Federal Courts cannot extend their jurisdiction; because, the objects of their cognizance being enumerated, the specification would be nugatory, if it did not exclude all ideas of more extensive authority."

In the seventy-eighth number, we have a more distinct exhibition of the author's views of a limited government, and of the power and office of the judiciary branch to secure it. "By a limited government, I understand one, which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice, no other way than through the medium of the courts of justice, whose duty it

* Judge *Chase*—3 *Dall.* 391. "The *Federalist*" has frequently, in other instances, been quoted with respect, in the courts of the *United States.*

must be, to declare all acts, contrary to the manifest tenour of the constitution, void. Without this, all the reservation of particular rights or privileges would amount to nothing."

We then have an interesting discussion on the necessity and foundation of this portion of judicial authority; it is illustrated by the usual exercise of judicial discretion, in discriminating between two contradictory laws, and a pertinent distinction is suggested, applicable to a supposed contravention of a constitutional provision. " Between the interfering acts of an *equal* authority, that, which was the last indication of its will, should have the preference. But, in regard to the *interfering* acts of a *superior* and *subordinate* authority, of an *original* and *derivative* power, the nature and reason of the thing indicate the *converse* of that rule, as proper to be followed. They teach us, that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and, that, accordingly, whenever a particular statute *contravenes* the constitution, it will be the duty of the judicial tribunals to adhere to the latter, and disregard the former. It can be of no weight to say, that the courts, on the pretence of a *repugnancy*, may substitute their own pleasure, to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen, in every adjudication upon a single statute."

In the eighty-first number, when replying to arguments, or suggestions, against the judiciary, from their supposed power of construing the laws according to the *spirit* of the constitution, it is said; " this, upon examination, will be found to be altogether made up of false reasoning, from misconceived fact. In the first place, there is not a syllable in the plan, under consideration, which *directly* empowers the national courts, to construe the laws according to the *spirit* of the constitution, or, which gives them any greater latitude in this respect, than may be claimed by the courts of every state. I admit, however, that the constitution ought to be the standard of construction for the laws; and that, when-

ever there is an *evident opposition*, the laws ought to give place to the constitution."

In the eightieth number, which exhibits a view of the judicial department, in relation to the extent of its powers, the general position is, that "there ought always to be a constitutional method of giving efficacy to *constitutional provisions*." Having laid down the principles, proper for the regulation of the federal judiciary, the writer proceeds to test, by those principles, the particular powers given to the judiciary, by the constitution. He then recites the first paragraph of the second section, of the third article, as constituting the entire mass of the judicial authority of the Union. Viewing it then, in detail, he proceeds to comment on the first part of the paragraph—"*The judicial power shall extend to all cases in law and equity arising, under this constitution* [*and*] *the laws of the United States*." "It has been asked," he observes, "what is meant by *cases arising under the constitution*, in contradistinction from those *arising under the laws of the United States?*" "The difference," he adds, "has been already explained. All the restrictions upon the authority of state legislatures furnish examples. They are not, for instance, to emit paper money; but the interdiction results from the constitution, and will have no connexion with any law of the United States. Should paper money, notwithstanding, be emitted, the controversies concerning it would be cases arising under the constitution, and not upon the laws of the *United States*, in the ordinary signification of the terms. This may serve as a sample of the whole."

These extracts give a clear and satisfactory view of the opinions entertained by the writer, or writers, of those papers, on this topic; and it is evident, that the judicial authority, is, in their estimation, precisely limited, in regard to deciding on the validity of legislative acts; and that the power to declare them void exists, only, in cases of *contravention*, *opposition* or *repugnancy*, to some express restrictions or provisions contained in the constitution. The examples and the argument apply only to cases of legislative

action, which their powers *forbid;* not to those, which their powers may be supposed *not to authorize.* This is further manifest from observations, variously interspersed, in those writings, relative to a supposed abuse or exceeding of powers, by the legislature; or, in other words, to an act of usurpation. In the first place, there is a strong conviction expressed, that no such case can or will occur, in a government so organized, and where such strong sympathies will exist, between the representatives and their constituents. That the government is in the hands of the representatives of the people, is pronounced to be, " the essential and only efficacious security for the rights and privileges of the people, which is attainable in civil society." But, should usurpation rear its head; should the unnatural case ever occur, when the representatives of the people should betray their constituents, we are referred, for consolation and remedy, to the power and vigilance of the state governments; to publick opinion; to the active agency of the people in their elections; to that perpetual dependence on the people, which is the primary controul on the government; " to the vigilant and manly spirit, which actuates the people of *America*, a spirit which nourishes freedom, and, in return, is nourished by it;" and, in case of desperate extremities, for which no system of government can provide, " to that original right of self-defence, which is paramount to all positive forms of government."

In one passage, indeed, where the writer is speaking of the resort, in case of a supposed usurpation, we are referred to the judiciary and to the executive, as well as to the people, without any discrimination of the circumstances to which the different sources of remedy would be applicable. " In the first instance," says the writer, " the success of the usurpation will depend on the executive and judiciary departments, which are to expound and to give effect to the legislative acts; and, in the last resort, a remedy must be ob-

tained from the people, who can, by the election of more faithful representatives, annul the acts of the usurpers."*

This passage may be so construed, as to be consistent with those before cited; but, if irreconcileable, with the doctrines so clearly expressed in other places, we must account for any supposed diversity of sentiment, from the circumstance, that those valuable papers were not all from the same pen.

Cases might be put, of acts, so manifestly without the sphere of objects, committed to the national government, that the judiciary branch might be competent to pronounce them invalid, not as repugnant to any particular clause of the constitution, but to its whole expressed design and tenour. "The propriety of a law," says the writer, "so frequently quoted, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced construction of its authority (which indeed cannot be easily imagined) the federal legislature should attempt to vary the *law of descent* in any state; would it not be evident, that, in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the state?" Here would be an obvious assumption of a *new power*, not to be found in the constitution, and it is distinguishable from an improper exercise, or undue extension, of a *power given*. "The national government, like every other," adds the writer, must judge in the first instance, of the proper exercise of its powers, and its constituents, in the last. If the federal government should overpass the just bound of its authority, and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures, to redress the injury done to the constitution, as the exigency may suggest, and prudence justify."†

It is a recommendation of these views of the constitutional powers of the judiciary, relative to legislative acts, that they reduce it to that precision and certainty, which is so desirable, in reference to judicial deliberations; and avoid those

* No. 44. Vol. II. p. 74.
† No. 33. Vol. I. p. 203.

manifest grounds or occasions of irreconcileable collision, between the judiciary and legislative departments, which might otherwise prevail. Affirmative provisions and express restrictions, contained in the constitution, are sufficiently definite to render decisions, probably in all cases, satisfactory; and the interferences of the judiciary with the legislature, to use the language of the constitution, would be reduced to "*cases*," easily to be understood, and, in which the superior, commanding, will of the people, who established the instrument, would be clearly and peremptorily expressed. To extend this censorial power further, and especially to extend it to the degree, contended for in the objections to the act now under consideration, would be found extremely difficult, if not impracticable, in execution. To determine where the legitimate exercise of discretion ends, and usurpation begins, would be a task most delicate and arduous. It would, in many instances, be extremely difficult to settle it, even in a single body. It would be much more so, if to be adjusted by two independent bodies, especially if those bodies, from the nature of their constitution, must proceed by different rules.

Before a court can determine, whether a given act of congress, *bearing relation to a power with which it is vested*, be a legitimate exercise of that power, or transcend it, the degree of legislative discretion, admissible in the case, must first be determined. Legal discretion is limited. It is thus defined by lord *Coke*, *Discretio est discernere, per legem, quid sit justum*. Political discretion has a far wider range. It embraces, combines and considers, all circumstances, events and projects, foreign or domestick, that can affect the national interests. Legal discretion has not the means of ascertaining the grounds, on which political discretion may have proceeded. It seems admitted, that *necessity* might justify the acts in question. But how shall legal discussion determine, that political discretion, surveying the vast concerns committed to its trust, and the movements of conflicting Nations, has not

perceived such necessity to exist? Considerations of this nature have induced a doubt of the competency, or constitutional authority of the court, to decide an act invalid, in a case of this description. On the precise extent, however, of the power of the court, I do not give a definite opinion; my view of the *main question*, submitted by the counsel, in this case, rendered such a decision unnecessary. I now proceed to the examination of that question. It will be perceived, that some of the considerations, suggested under the last head, have an application to the remaining inquiry, and, it is acknowledged, that they had an influence in forming my determination.

It is contended, that Congress is not invested with powers, by the Constitution, to enact laws, so general and so unlimitted, relative to commercial intercourse with foreign nations, as those now under consideration.

It is well understood, that the depressed state of American commerce, and complete experience of the inefficacy of State regulations, to apply a remedy, were among the great, procuring causes of the federal Constitution. It was manifest, that other objects, of equal importance, were exclusively proper for national jurisdiction; and that under national management and controul, alone, could they be advantageously and efficaciously conducted. The Constitution specifies those objects. A national sovereignty is created. Not an unlimited sovereignty, but a sovereignty, as to the objects surrendered and specified, limited only by the qualifications and restrictions, expressed in the Constitution. Commerce is one of those objects. The care, protection, management and controul, of this great national concern, is, in my opinion, vested by the Constitution, in the Congress of the United States; and their power is sovereign, relative to commercial intercourse, qualified by the limitations and restrictions, expressed in that instrument, and by the treaty making power of the president and senate.

"Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the

Indian tribes." Such is the declaration in the constitution. Stress has been laid, in the argument, on the word *regulate*, as implying, in itself, a limitation. Power to *regulate*, it is said, cannot be understood to give a power to *annihilate*. To this it may be replied, that the acts under consideration, though of very ample extent, do not operate as a prohibition of *all* foreign commerce. It will be admitted that partial prohibitions are authorized by the expression; and how shall the degree, or extent, of the prohibition be adjusted, but by the discretion of the national government, to whom the subject appears to be committed? Besides, if we insist on the exact and critical meaning of the word *regulate*, we must, to be consistent, be equally critical with the substantial term, *commerce*. The term does not necessarily include *shipping or navigation;* much less does it include the *fisheries*. Yet it never has been contended, that they are not the proper objects of national regulation; and several acts of congress have been made respecting them. It may be replied, that these are incidents to commerce, and intimately connected with it; and that congress, in legislating respecting them, act under the authority, given them by the constitution, to make all laws *necessary* and *proper*, for carrying into execution the enumerated powers. Let this be admitted; and are they not at liberty, also, to consider the present prohibitory system, as *necessary* and *proper* to an eventual beneficial regulation? I say nothing of the *policy* of the expedient. It is not within my province. But, on the abstract question of constitutional power, I see nothing to prohibit or restrain the measure.

Further; the power to regulate commerce is not to be confined to the adoption of measures, exclusively beneficial to commerce itself, or tending to its advancement; but, in our national system, as in all modern sovereignties, it is also to be considered as an instrument for other purposes of general policy and interest. The mode of its management is a consideration of great delicacy and importance; but, the national right, or power, under the constitution, to adapt regula-

tions of commerce to other purposes, than the mere advancement of commerce, appears to me unquestionable.

Great Britain is styled, eminently, a commercial nation; but commerce is, in fact, a subordinate branch of her national policy, compared with other objects. In ancient times, indeed, *shipping* and *navigation* were made subordinate to *commerce*, as then contemplated. The mart, or staple, of their principal productions, *wool*, *leather* and *lead*, was confined to certain great towns in the island, where foreigners might resort to purchase; and Englishmen were restrained from exporting those commodities, under heavy penalties. It was conceived, that trade thus conducted, would be more advantageous to the country, than if transacted by the English, on the continent. On this idea was made the statute of the staple; 27 *Edw.* 3. [vid. *Reeves'* Hist. of *English* Law, 2. 393.] This may appear a strange regulation. It was evidently founded on erroneous views, and *Selden*, the learned commentator on *Fortescue*, remarks, "that all acts or attempts, which have been derogatory to trade, have ever been noted to be discouraged and short lived," in that nation. It is well known, how the views of their statesmen, and their commercial laws have changed, since that statute was enacted. The *navigation system* has long stood prominent. The interests of commerce are often made subservient to those of shipping and navigation. Maritime and naval strength is the great object of national solicitude; the grand an ultimate objects are the defence and security of the country.

The situation of the *United States*, in ordinary times, might render legislative interferences, relative to commerce, less necessary; but the capacity and power of managing and directing it, for the advancement of great national purposes, seems an important ingredient of sovereignty.

It was perceived, that, under the power of regulating commerce, congress would be authorized to abridge it, in favour of the great principles of humanity and justice. Hence the introduction of a clause, in the constitution, so framed, as to interdict a prohibition of the slave trade, until 1808. *Mas-*

sachusetts and *New York* proposed a stipulation, that should prevent the erection of commercial companies, with exclusive advantages. *Virginia* and *North Carolina* suggested an amendment, that "no navigation law, or law regulating commerce, should be passed, without the consent of two thirds of the members present, in both houses." These proposed amendments were not adopted, but they manifest the public conceptions, at the time, of the extent of the powers of congress, relative to commerce.

It has been said, in the argument, that the large commercial states, such as *New York* and *Massachusetts*, would never have consented to the grant of power, relative to commerce, if supposed capable of the extent now claimed. On this point, it is believed, there was no misunderstanding. The necessity of a competent national government was manifest. Its essential characteristics were considered and well understood; and all intelligent men perceived, that a power to advance and protect the national interests, necessarily involved a power, that might be abused. The *Federalist*, which was particularly addressed to the people of the state of *New York*, frankly avows the genuine operation of the powers, proposed to be vested in the general government.

"If the circumstances of our country are such, as to demand a compound, instead of a simple, a confederate, instead of a sole, government, the essential point, which will remain to be adjusted, will be to discriminate the *objects*, as far as it can be done, which shall appertain to the different provinces, or departments, of power; allowing to each the most ample authority for fulfilling *those*, which may be committed to its charge. Shall the union be constituted the guardian of the common safety? Are *fleets*, and *armies*, and *revenues* necessary for this purpose? The government of the union must be empowered, to *pass all laws, and to make all regulations which have relation to them.* The same must be the case, in respect to *commerce*, and to every other matter, to which its jurisdiction is permitted to extend."*

* No. 23. Vol. I. p. 146.

If it be admitted that national regulations relative to commerce, may apply it as an instrument, and are not necessarily confined to its direct aid and advancement, the sphere of legislative discretion is, of course, more widely extended; and, in time of war, or of great impending peril, it must take a still more expanded range.

Congress has power to *declare war*. It, of course, has power to prepare for war; and the *time*, the *manner*, and the *measure*, in the application of constitutional means, seem to be left to its wisdom and discretion. Foreign intercourse becomes, in such times, a subject of peculiar interest, and its regulation forms an obvious and essential branch of the federal administration. In the year 1798, when aggressions from *France* became insupportable, a non-intercourse law, relative to that nation and her dependencies, was enacted; partial hostilities, for a time, prevailed; but no war was declared. I have never understood, that the power of congress to adopt that course of proceeding was questioned.

It seems to have been admitted, in the argument, that *state necessity* might justify a limited *embargo*, or suspension of all foreign commerce; but if congress have the power, for purposes of *safety*, of *preparation*, or *counteraction*, to suspend commercial intercourse with foreign nations, where do we find them limited as to the *duration*, more than as to the *manner* and *extent* of the measure? Must we understand the nation as saying to their government—"We look to you for protection and security, against all foreign aggressions. For this purpose, we give you the controul of commerce; but, you shall always limit the time, during which this instrument is to be used. This shield of defence you may, on emergent occasions, employ; but you shall always announce to us and to the world, the moment when it shall drop from your hands."

It is apparent, that cases may occur, in which the indefinite character of a law, as to its termination, may be essential to its efficacious operation.

In this connexion, I would notice the internal indications, exhibited by the acts themselves, relative to their duration.

In addition to the authority given to the President to suspend the acts, upon the contingency of certain events, we have evidence, from the very nature of their provisions, that they cannot be designed to be perpetual. An entire prohibition of *exportation*, unaccompanied with any restriction on *importations*, could never be intended for a *permanent system;* though the laws, in a technical view, may be denominated *perpetual*, containing no specification of the time when they shall expire.

In illustration of their argument, gentlemen have supposed a strong case; a prohibition of the future cultivation of *corn*, in the United States. It would not be admitted, I presume, that an act, so extravagant, would be constitutional, though *not perpetual*, but confined to a *single season*. And why? Because it would be, most manifestly, without the limits of the federal jurisdiction, and relative to an object, or concern, not committed to its management. If an embargo, or suspension of commerce, of any description, be within the powers of congress, the terms and modifications of the measure must also be within their discretion. If the measure be referred to *State necessity*, the body that is authorized to determine on the existence of such necessity, must, also, be competent so to modify the means, as to adapt them to the exigency.

It is said, that such a law is in contravention of unalienable rights; and we have had quotations from elementary writers, and from the bills of rights of the State Constitutions, in support of this position. The doctrines and declarations of those respectable writers, and in those venerable instruments, are not to be slighted; but we are to leave the wide field of general reasonings and abstract principles, and are to consider the construction and operation of an *express compact*, a government of *convention*.

The general position is incontestible, that all that is not surrendered by the Constitution, is retained. The amendment which expresses this, is for greater security; but such

would have been the true construction, without the amendment. Still, it remains to be determined, and it is often a question of some difficulty, what is *given?* By the second article of the confederation, congress were prohibited the exercise of any power not *expressly* delegated. A similar qualification was suggested, in one of the amendments proposed by the State of New-Hampshire, to the new Constitution. The phraseology, indeed, was strengthened; and congress were to be prohibited from the exercise of powers, not *expressly* and *particularly* delegated.

Such expressions were not adopted. If they had been, as an intelligent writer justly observes, "Congress would be continually exposed, as their predecessors, under the confederation, were, to the alternative of construing the term, *expressly*, with so much rigour, as to disarm the government of all real authority whatever; or, with so much latitude, as to destroy, altogether the force of the restriction."

It is wisely left as it is; and the true sense and meaning of the instrument is to be determined by just construction, guided and governed by good sense and honest intentions.

Under the confederation, Congress could have no agency relative to foreign commerce, but through the medium of treaties; and, by the ninth article, it was stipulated, that no treaty of commerce should be made, whereby the legislative power of the respective States, should be restrained, from imposing such imposts and duties on foreigners, as their own people were subjected to, "*or from prohibiting the exportation of any species of goods or commodities whatsoever.*"

Here we find an express reservation to the State legislatures of the power to pass prohibitory commercial laws, and, as respects *exportations*, without any limitations. Some of them exercised this power. In Massachusetts, it was carried to considerable extent, with marked determination, but to no sensible good effect. One of the prohibitory acts of that State, passed in 1786, was for the express "encouragement of the agriculture and manufactures in our own country."

The other, which was a counteracting law, had no definite limitation, but was to continue in force, until Congress should be vested with competent powers, and should have passed an ordinance for the regulation of the commerce of the States. Unless Congress, by the Constitution, possess the power in question, it still exists in the State legislatures —but this has never been claimed or pretended, since the adoption of the federal Constitution; and the exercise of such a power by the States, would be manifestly inconsistent with the power, vested by the people in Congress, "to regulate commerce." Hence I infer, that the power, reserved to the States by the articles of confederation, is surrendered to Congress, by the Constitution; unless we suppose, that, by some strange process, it has been merged or extinguished, and now exists no where.

The propriety of this power, on the present construction, may be further evinced, by contemplating the operation of specific limitations or restrictions, which it might be proposed to apply. Will it be said, that the amendment, proposed by Virginia and North-Carolina, would be an improvement in the instrument of government? Such a provision might prevent the adoption of exceptionable regulations; but, it would be equally operative in defeating those that would be salutary; and would disable the majority of the nation from deciding on the best means of advancing its prosperity. To avoid such a system, as is now in operation, shall the people expressly provide, as a limitation to the power of regulating commerce, that it shall not extend to a total prohibition; or but for a limited time? Nothing would be gained by such restrictions. A prohibition might still be so nearly total, or extend to such a length of time, without violation of the restriction, as to be equivalent, in practical effect, to the present arrangement. Or will it be said, that the judiciary should then be called upon to decide the law void, though not repugnant to the terms of the restriction, and to consider exceptions from the prohibition, as, in the common case of a fraudulent deed, to be merely *colourable?* Loose

and general restrictions would be ineffective, or, at best, merely directory. If particular and precise, they would evince an indiscreet attempt to anticipate the immense extent and variety of national exigencies, and would not be suitable appendages to a power, which, in its exercise, must depend on contingencies, and, from its nature and object, must be general. A particular mischief or inconvenience, contemplated in framing such limitations, might be avoided; but they would also injuriously fetter the national councils, and prevent the application of adequate provisions for the publick safety and happiness, according to the ever varying emergencies of national affairs. Let us not insist on a security, which the nature of human concerns will not permit. More effectual guards against abuse, more complete security for civil and political liberty, and for private right, are not, perhaps, afforded to any nation than to the people of the *United States*. These views of the national powers are not new. I have only given a more distinct exhibition of habitual impressions, cœval, in my mind, with the constitution. Upon these considerations, I am bound to overrule the objections to the acts in question, which I shall proceed to apply to the cases before the court, believing them to be constitutional laws.

I lament the privations, the interruption of profitable pursuits and manly enterprize, to which it has been thought necessary to subject the citizens of this great community. I respect the merchant and his employment. The disconcerted mariner demands our sympathy. The sound of the axe, and of the hammer, would be grateful music. *Ocean*, in itself a dreary waste, by the swelling sail and floating streamer, becomes an exhilirating object; and it is painful to perceive, by force of any contingencies, the *American* stars and stripes vanishing from the scene. Commerce, indeed, merits all the eulogy, which we have heard so eloquently pronounced, at the bar. It is the welcome attendant of civilized man, in all his various stations. It is the nurse of arts; the genial friend of liberty, justice and order; the sure source of na-

tional wealth and greatness; the promoter of moral and intellectual improvement; of generons affections and enlarged philanthropy. Connecting seas, flowing rivers, and capacious havens, equally with the fertile bosom of the earth, suggest, to the reflecting mind, the purposes of a beneficent Deity, relative to the destination and employments of man. Let us not entertain the gloomy apprehension, that advantages, so precious, are altogether abandoned; that pursuits, so interesting and beneficial, are not to be resumed. Let us rather cherish a hope, that commercial activity and intercourse, with all their wholesome energies will be revived; and, that our merchants and our mariners will, again, be permitted to pursue their wonted employments, consistently with the NATIONAL SAFETY, HONOUR and INDEPENDENCE!

CASE

LAID BEFORE COUNSEL FOR THEIR

OPINION,

ON THE CLAIM TO THE BATTURE,

Situated in front of the suburb St. Mary, New-Orleans:

WITH THE OPINIONS OF M. DERBIGNY, MESS. DU POUCEAU, INGERSOLL, RAWLE, LEWIS AND TILGHMAN.

THE Superiour Court of the territory of Orleans tried, a few months ago, a cause which, by the magnitude, importance and singularity of the questions which it presented, and still more by the publick interest attached to it, had excited for upwards of three years, the talents of several advocates, the attention of the court, and general curiosity; I mean the suit brought by Mr. *Jean Gravier* against the corporation of *New Orleans*, relative to the possession and enjoyment of the batture situate in front of the suburb *St. Mary* of that city.

When the first colonists from Europe arrived on the banks of the Mississippi, they had in a manner to conquer the solid earth from the inundations of that river; it was necessary to restrain the waters by dykes or levees sufficient to protect the land against the rage of inundations, especially at the time of periodical swells. Thence the origin of what is called battures in this territory, which are only certain portions of the bed of the river which the *Mississippi* leaves dry when its waters are low, and covers wholly or in a great measure, in its annual swells.

There has existed from time immemorial, a considerable batture in front of the suburb *St. Mary* of *New Orleans*. That batture begins at the entrance of the suburb on the side

of the city, and runs widening as far as the plantation which formerly belonged to Madame *Delor*.

That batture seems to have been fortunately placed there to favour the building of the city which has risen near it; it may even be said that *New Orleans* would perhaps never have existed, or that it would have been built but very slowly, but for the aid of that natural depositum of materials placed as it were at its door. In a country like lower *Louisiana*, where neither mountains nor hills are to be seen; where not a single stone exists that is not brought thither; where to dig the soil is to incur the danger not only of impairing the land, but of creating infectious and pestilential quagmires, it is easy to conceive how valuable must be a mass of sand and mud incessantly renewed by the bounty of the river, for the building of a large and commercial town, and to repair the losses of the soil which is perpetually falling away, owing to its natural slope, and its situation below the level of the river. Thus it may be said with truth that the whole town of *New Orleans*, with its levees and streets, has been built and always kept in repair by means of the earth drawn from the batture of the suburb *St. Mary*, and that it is almost impossible to find earth elsewhere in sufficient quantity for those purposes, that batture being the only one in proximity to the town.

It is a fact of publick notoriety, that before the claim of *Jean Gravier* was set up (and that claim was laid for the first time in 1804) the inhabitants of *New Orleans* had always enjoyed the liberty of gratuitously taking from the batture of the suburb *St. Mary*, all the earth they had need of for their buildings; that the Spanish government and the cabildo had also ever used this right, taking there earth for the publick uses, such as raising the streets and repairing the levees of the city. It was further proved on the trial, that the *Spanish* government and the *French* government that had preceded, had always evinced a settled determination to preserve to the inhabitants of *New Orleans* the free use of the batture, so useful and indispensible to them, not only for

getting earth there, but to supply various other necessities not less urgent. In fact the batture of the suburb *St. Mary* always served as a place where to lay up wood for fuel and the timber necessary for the consumption of a large city; nor does there exist at *New Orleans*, any other convenient place where to store those materials.

It would moreover have been to devote the population of this city to ravaging epidem' , to permit any individual to appropriate to himself, the soil of the batture of the suburb *St. Mary*, to the prejudice of the publick, for besides the disadvantages that would thence result to the navigation of the river and to commerce in general, the least building or work raised on that batture, would, by the accumulation of slime and filth conglomerated there during the freshes, have, every summer formed a focus of pestilential disease. Accordingly, the *Spanish* government and the cabildo, constantly opposed the forming of any establishment on the batture, and they at different times, caused to be demolished the houses and other buildings, which divers persons had ventured to erect there, at different periods.

Such was the situation of affairs when *Louisiana* was ceded to the *United States* of *America*. The prodigious increase of the commerce of *New Orleans*, resulting from this change of dominion, rendered it still more necessary to leave the batture free to the publick, as it had till then been; for the levee bounding that batture is the place where the numerous boats, called *flats*, which annually arrive at *New Orleans*, laden with flour and provisions of all kinds, come to land and discharge their cargoes.

But this very consideration exciting the cupidity of Mr. *Jean Gravier*, the former proprietor of the plantation on which the suburb *St. Mary* had been formed, suggested to him the idea of raising a claim, which he had never thought of before, and prompted him to maintain that batture, being real alluvions, that of the suburb *St. Mary* belonged to him, as he had been the proprietor of the land which immediately bounds it.

The inhabitants of *New Orleans*, who had, from time immemorial, enjoyed that batture, could not oppose to *Jean Gravier* a positive title of grant in their favour; but they opposed to him their long enjoyment, which was to supply the want of a grant, by the effect of prescription; they opposed to him the acts of the *Spanish* government, which had constantly maintained them in that enjoyment; they finally opposed to him his own acts and those of *Bertrand Gravier* from whom he derived his title, which acts seemed to amount to an acknowledgement of their right.

But the Superiour Court did not think proper to yield to these reasons; it declared the corporation of *New Orleans*, destitute of any title against *Jean Gravier*, *and has maintained the latter in the possession and enjoyment of the batture.* This judgment is doubtless to be respected, because it was rendered by a court that judges in the last resort. To its execution, however distressing it be to the publick, not the smallest opposition has ever been made, for *Jean Gravier* has been peacefully put into possession by the sheriff. It is true that the incalculable advantages of the batture having been more sensibly felt, since the publick has been deprived of them, the publick mind has been heated to such a temper as to hinder, for some days, the workmen of *Jean Gravier* from working at a trench which he or Mr. *Livingston*, jointly interested, wished to cut on the batture, to drain off the water.

But happily this transient ferment was not followed with any reprehensible excess, and the people brought back to reflection, were sensible that submission to the laws, is the first duty of citizens, and that there exists more regular means of obtaining justice, than those which a sudden effervescence had alone made them adopt. And in fact, whatever respect may be due to the decisions of the court, does there exist an absolute interdict against submitting its dispensations, in a particular case, to a superiour authority? Does not the cause of the batture interest not only the inhabitants of *New-Orleans*, but also those of all *Louisiana*, and even

those of the inner states of the union, who considering *New-Orleans* as their common emporium, must feel interested in all that conduces to the facility and prosperity of its commerce? In a cause of this nature would it be astonishing to see the congress itself interpose its authority, and order the revision of a judgment which though without appeal, should appear to congress to clash with our usages, our privileges and our laws! The peculiar situation of this territoty, newly acquired to the *United States*, governed by the civil law, so different from that which rules the rest of the union, so lately transferred from a government which manifests the sovereign authority more frequently by ostensible acts than by writings, must surely, it should seem, be powerful motives to induce the general government to bestow on the examination of this cause all the attention and consideration it deserves! Will not the general government reflect that Louisiana, by the very nature of the provisional government which rules it, is deprived of a part of the advantages enjoyed by the other citizens of the union, in their judiciary contests, and that the fate of their fortunes and their lives, is definitively submitted to one sole tribunal, composed of three judges who decide at once in the first instance and in the last resort, in a country whose language, manners, usages, and even sometimes whose laws, are little familiar to them, and that the acknowledged integrity and information of those three judges, are not always a solid security for the irrefragability of their judgment?

But, to take another view of the subject, the superiour court has done no more than to exclude the corporation from all kind of right to the batture, in declaring that the city had no title against *Jean Gravier*. But it has not declared *Jean Gravier* to be the legitimate proprietor of the batture; and had it even done so, it could not thereby have impaired the right of those who were not parties to the suit, and therefore the *United States* have a clear title, if it be proved that the demesne never relinquished its claim, in favour of the ancestors of *Jean Gravier* either to the property of the batture or

alluvion, or to that of the contiguous land, that is, of the royal road which existed between the river and the plantation where the suburb St. Mary is now built. It is then a question open to discussion, at least as respects the *United States*, whether *Jean Gravier* can be considered as the real riparious proprietor of the batture; and hence it is proper to state such facts as may serve to establish the right of demesne.

The suburb *St. Mary* is built on the land of a plantation which formerly belonged to the Jesuits; their titles of property, which could however no way effect this cause, appear to have been lost in the fire which almost entirely destroyed this city, in the month of *December*, 1794.

In the year 1763, the Jesuits were suppressed and their property was confiscated to the crown. Hence the superiour council of the colony made a decree for the publick sale of the property which they had possessed in *Louisiana*.

As a preliminary to this sale the engineer *Olivier Devizen*, who discharged the functions of surveyor in *Louisiana*, was directed to survey the land which the Jesuits had possessed near this city, on which land now stands the suburb *St. Mary*.

Olivier Devezin, in compliance with those directions, on the 22d of *July*, 1763, performed the first operation of the survey, in which he placed the front line of said plantation at thirty toises from the fortifications of the city, and at six toises five feet from the middle of the levee; thus leaving between the plantation and the river, a pretty considerable space, where lay the royal or publick road, which was then situate as it is at present; for the road fronting the suburb, as far as the plantation of Madame *Delor*, has never varied, within the memory of man.

On the 24th of *November*, 1763, *Olivier Devezin* performed a second operation, in which having taken up his lines, to rectify an error which he found in the length of his base, in his first operation,* he finally discovered that that base

* In his first proces verbal he found that that line was of thirty three arpents and a third and one toise.

had thirty-two arpents in front, by fifty arpents in depth, as was declared in the process verbal of *Broutin*, by which he was working. *Olivier Devezin*, then divided all the lands of the Jesuits into six lots, to facilitate the sale; and of those lots, that which was nearest the fortifications of the city, and which was marked as having seven arpents in front by fifty in depth, was adjudged to Mr. *Pradel*, a lieutenant of the navy.

It is most important to observe that at the period the sale was made, of the different lots of the Jesuits land, *Louisiana* was under the dominion of *France*. The *French* laws must therefore direct our judgment as to the effect of those sales, and the extent of the right which they could transfer to Pradel and other purchasers of the Jesuit's property.

Another fact not less important, is that, at the period of those sales, and long before, there existed a batture in front of the ground now occupied by the suburb *St. Mary*.*— The question of property in that batture, must therefore be decided by the French laws which were in force at the time of the sale of the plantation lying nearest to it.

Since 1763, it appears that those different lots of the Jesuits' land, passed successively through the hands of various purchasers, until at last about seventeen arpents of that land, on the side of the town, were united in the possession of a single proprietor, the late *Bertrand Gravier*, ancestor of *Jean Gravier*, and founder of the suburb *St. Mary*. How *Bertrand Gravier*, or rather those under whom he claimed, became proprietors of those seventeen arpents of land, is what has never been satisfactorily explained. It was indeed proved that *Bertrand Gravier* was heir to his wife, who had been the relict of one *Renard:* and that the said *Renard* had purchased of Madame *Pradel*. But how had Madame *Pradel* thirteen arpents to sell, when her husband had originally purchased but seven? And even on the supposition that she was the proprietor of the thirteen arpents mentioned in the

* Testimony of Messrs. Livaudais and Durcy.

sale made to *Bertrand*, how did it happen that *Bertrand Gravier* who had inherited no more than the rights of the widow *Renard*, gave to his suburb nearly seventeen arpents in front? Here surely is some chasm in the titles presented by *Jean Gravier*.

Be it as it may, in 1767, *Louisiana* passed from the dominion of *France* to that of *Spain*, and in 1788, *Bertrand Gravier* conceived the idea of establishing a suburb, under the name of *St. Mary*, on that part of the Jesuit's plantation possessed by him. With this view he caused to be drawn a plot of the laying off of the ground, in streets and building lots, by Mr. *Laveau Trudeau*, at that time surveyor-general of *Louisiana*.

In the year 1796, *Bertrand Gravier* enlarged his original design, by adding new streets and a publick square to his suburb. He requested Mr. *Laveau Trudeau* to draw a new plot conformable to his new ideas, and his subsequent sales were all according to the latter plot.

No person acquainted with the principles of monarchichal government, and especially with those of *Spain*, can be persuaded that *Bertrand Gravier* could ever have presumed to establish a suburb, without a superiour approbation, and without submitting himself to certain conditions of general police, common to all *Spanish* cities, both of the old and the new world. What proves that Mr. *Bertrand Gravier* obtained that approbation and submitted himself to those conditions, is that he directed Mr. *Laveau Trudeau* to deposit a duplicate of the plot of 1796, in the archives of government, and that the duplicate was there deposited conformably to his desire. Now, was it merely to ornament the archives of government that Mr. *Bertrand Gravier* there deposited his plot, or was it for the purpose of making that plot serve as a kind of deed or publick instrument that might ascertain the manner in which he had agreed with the government to establish and divide his suburb? On this question, no impartial mind can entertain a doubt.

This point being established, if we examine the copy of the plot of 1796, which is recognised by Mr. *Laveau Trudeau* to be that by him deposited in the archives of the *Spanish* government, we find that the batture is there marked as a space which is to remain free, and not subject to be built on; for it is no way divided into lots, as is the land of the suburb. If then *Bertrand Gravier* ever had any right to the batture, as riparious proprietor, did he not lose it by the tacit contract which he then made with the *Spanish* government, in depositing the plot of his suburb?

That this act of depositing the plot was considered as a relinquishment of his right, is confirmed by the testimony of Mr. *Laveau Trudeau;* by all the subsequent conduct of *Bertrand Gravier*, and finally by the publick acts of the cabildo and of the *Spanish* government.

Mr. *Laveau Trudeau* deposed, that having asked Mr. *Bertrand Gravier* when he was making the plot of 1796, whether he should divide the batture into lots as well as the rest of the ground, the latter replied in the negative, observing that the batture was publick property.

Mr. *Laveau Trudeau* further deposed, that Miss *Trudeau* and Mr. *Poeyfaré*, who had purchased of *Bertrand Gravier* some lots on the front of the suburb, on the side of the river, solicited him to sell them the portion of the batture that lay opposite those lots, and that he refused to sell the same, alleging that he had not a right to dispose of it, though Mr. *Laveau Trudeau* declared himself of the contrary opinion.

Mr. *Livaudais* the father, a respectable inhabitant of this territory, as also Mr. *Rousseau*, deposed that under the government of the Baron de Carondelet, *Bertrand Gravier* had refused to repair the road and the levee in front of the suburb *St. Mary*, under the pretext that he had converted his plantation into a suburb, and sold the front lots, the duty no longer concerned him as the batture was publick property; in consequence of which declaration the government caused the roads to be repaired by the criminals at hard labour.

To these publick acts of *Bertrand Gravier* are opposed solitary deeds of sale, hidden under the dust of a notary's office, whence they would never have been taken but for the present circumstances. But was it not proved on trial, in what manner those deeds of sale had been obtained from *Bertrand Gravier ?* Did not witnesses prove, that in selling some portions of that batture to some individuals, *Bertrand Gravier* had only yielded to their solicitations, and had declared that it could avail nothing, and that he had not a right to do what was required of him? But even were it otherwise, what could be inferred from clandestine deeds? Were those deeds ever brought forward during the *Spanish* government? Did the purchasers who might have availed themselves of them ever venture to make the least use of them? So far were they from availing themselves of them, that we shall see that Mr. *Claude François Girod*, one of the purchasers who had required *Bertrand Gravier* to sell them the batture in front of their lots in the suburb *St. Mary*, solicited the cabildo for permission, to erect a corn mill on that portion of the batture which he had thus caused to be sold to him, and that that permission was refused him.

The same judgment may be formed of the evidence of which *Jean Gravier* attempts to avail himself, to prove that the *Spanish* government acknowledged his right to the batture; we mean to speak of the deposition of Mr. *Sigur*, who maintains that Mr. *de Carondelet* sent him one day to Mr. *Bertrand Gravier*, to request of him permission to lay masts belonging to government, on the batture of the suburb!

To such evidence we can oppose, not conversations held by the governors, in private, or in their own houses, but the publick acts of those same governors in their political capacity, with the assistance of the auditor of war, their indispensable counsel, whenever they decided contestable points.

We shall oppose the fact to which Mr. *Pedesclaux* testified, that in 1794, Mr. de Carondelet caused it to be proclaimed by beat of drum, that it was forbidden to erect any buildings

on the batture, and that all then standing thereon were ordered to be taken down.

We shall oppose the verbal decision given by Mr. *Nicolas Vidal*, auditor of war, who being consulted by the *Baron de Carondelet*, who wished to know what he could do for Mr. *Christoval de Armas*, who solicited permission to establish a brick kiln on the batture of the suburb *St. Mary*, answered: "That that permission could not be granted, by reason that all that part of the strand of the river which its waters cover in their greatest swells, is publick property."

These acts of government, in favour of the publick enjoyment of the batture, are confirmed, and in a manner corroborated by the deliberations of the cabildo, at which it is known that the governor always presided.

It is indeed to be regretted that the records of the cabildo were left in the utmost confusion, on the late change of government that took place in *Louisiana*. But for that circumstance we might surely have found among them important documents relative to the batture, and not only amongst those records, but also in the archieves of government, which were carried off to *Pensacola*, without its having ever occurred to any person to search amongst them, for documents that might interest so important a cause, of which it was impossible to foresee the existence.

Yet we read in the register of the cabildo, a declaration dated the 29th of August, 1795, which authorises to be defrayed out of the city funds, the expense of a fence which Mr. *de la Chaise*, the regidor, had caused to be made on the batture of the suburb *St. Mary*, in order to preserve earth there, for the use of the publick in the time of high water. That fence lasted several years, and traces of it were to be seen not long ago.

In fine, in the year 1801, Mr. *Claude François Girod*, who, as has been seen, had secretly bought of *Bertrand Gravier*, that portion of batture which was in front of his property in the suburb, applied to the cabildo, for permission to establish a brick-kiln on that same part of the batture; but the cabil-

do, by its deliberation of the 5th of *June* of the same year thought proper to refuse him that permission.

It is particularly to be observed, that at the time of that deliberation, the president of the cabildo was the same *Niçolas Vidal*, whose knowledge in jurisprudence is so well attested in this territory, and who then discharged the functions of governor *pro tempore*.

During the same deliberation, it was observed that the government had already, by proclamation, forbidden to build on the batture; but that, notwithstanding that prohibition, several persons had there erected buildings. On this it was ordered that those persons should be cited to appear, that whatever claims they might have, might be examined and decided.

Mr. *Caisergues*, who was the procureur-syndic, and was present at that deliberation, asserts that Mr. *Niçolas Vidal* delivered, on that occasion, a written opinion, the result of which was, that no person had a right to build on the batture, and that it was publick property.

And accordingly, we read on the register, a memorandum, subjoined to the deliberation, purporting "that orders were subsequently given for the demolition of all buildings which had been erected on the batture," and several witnesses attest that those orders were executed, and that Miss *Trudeau* among others, who had a small house on the batture was obliged to throw it down.

Bertrand Gravier died in 1797, leaving several brothers and sisters his heirs; but as *Jean Gravier*, one of his heirs was the only one present in *Louisiana* at the time of *Bertrand's* death, *Jean* contrived to have all the estate of the succession adjudged to himself, at the rate of the estimate to be made thereof. That estimate was made in the month of *July*, 1797; in it were described and separately appraised, the lots and grounds unsold in the suburb *St. Mary*; no mention was made of the batture, and it would indeed have been very difficult to appraise it, for it was then entirely covered with water. Yet it is by virtue of that sale or adjudication, that

Jean Gravier pretends to be the proprietor of the batture and has succeeded in causing himself to be maintained in it.

In the course of his lawsuit with the city, *Jean Gravier* required Mr. *Mansuy*, the engineer, to ascertain whether his land had the fifty acres in depth which has been seen, are guaranteed by the original sales made to Pradel and others, of the *Jesuit's* land. Mr. *Mansuy* attested that he had found by survey, that the land of *Jean Gravier*, beginning at the angle of the suburb on the city side, had not only fifty acres in depth, but that he measured as far as fifty-six acres, at which spot he found marked trees which he was told was the boundary line of Mr *J. B. Macarty*.

The question now to be resolved is, whether, according to the French laws, which were in force at the time of the sale of the *Jesuit's* property, and which ordain that the soil formed by *alluvions* or *atterissements*, on navigable rivers, belong to the king, if he has not renounced his claim to them by a formal and express grant;

Whether, on full proof of the existence of a space of earth which the king had reserved to himself between the river and the *Jesuit's* plantation, on which reserved space are the royal highway and the levee, the reservation of which space is proved by its not being comprised in the surveys and sales ordered by the king;

Whether the firm resolution which the *Spanish* government always evinced, of keeping the batture, which is behind that levee, for publick uses, by permitting no person to settle on it, and refusing any grant inconsistent with that resolution;

Whether all these considerations do not prove that the sovereign's right to that batture as well as to the adjoining levee and highway, was never alienated and made over to *Jean Gravier* or any other person: and whether the *United States* have not consequently a well founded and clear title to the property, as being part of the publick demesne?

M. DERBIGNY'S OPINION.

.....

Having considered the above statement of the case, together with the documents relative to the *batture* or *alluvion* there referred to, and the testimony heard in the suit between *Jean Gravier* and the corporation of *New Orleans;*

The undersigned counsel is of opinion that the said batture or alluvion, is a property formerly royal, which passed from the crown of *France* to that of *Spain*, and belongs at present to the *United States*.

This opinion is founded on the following reasons:

1st. Alluvions on navigable rivers belonged to the king of *France*.

2ndly. The plantation bordering on the limits of the city of *New Orleans* was sold by the king of *France* in 1763, when the alluvion situate in front of that land was already in being.

3dly. Between the alluvion and the land sold, lay a royal road (the same that still exists) and a levee, both which were then, and have still remained publick property.

4thly. The alluvion in question has never ceased to be a royal property, the enjoyment of which the *French* and *Spanish* governments at all times left to the publick, and on which they constantly hindred private individuals from encroaching.

5thly. Neither *Jean Gravier*, nor those from whom he derives his title, ever were in possession of the alluvion; and *Bertrand Gravier* himself, at the time of his settling a suburb in front of his plantation, declared that he had no claim to the alluvion.

Let us examine each of these points separately, with the attention due to the importance of the subject.

FIRST POINT.

" The alluvions or accretions on navigable rivers, belonged to the king of France."

On this question of right it is sufficient to recur to the edicts of the kings of *France*, made at different times, on this subject, and particularly to those of *April* 1683, *December* 1693, and *February* 1710, which are formally explicit on this point.

The power of royal edicts is universally known.—" They are," says the learned lawyer, editor of those decrees, " emanations of the sovereign authority, which form the most certain part of *French* jurisprudence, as well as the part most generally received.—The splendour of their immediate source secures to them a pre-eminence over all other laws. The will of the prince is equal to his power, and extends as far as the boundary of his empire. The ordinances are therefore the general laws of the kingdom, which, of consequence, must supercede not only the *Roman* law, which is in force only in countries of written law, but also in the laws established by our customs, which are only particular laws of the countries which have adopted them."

In consulting the authors who have written on the *French* laws, we find the principle laid down in the above cited edicts, acknowledged and confirmed in their works. Pothier, one of the most respectable of those authors, in his treatise on the law of demesne and property, part 1, chap. 2, sect. 3, art. 2, no. 159, expresses himself in these terms:

" By our *French* law, the alluvions formed on the borders of navigable streams and rivers belong to the king. The proprietors of riparious heritages can have no claim to them, unless they have titles of the grant made to them by the king, of the right of alluvion along their heritages."

This opinion seems indeed to be contradicted by that of Denizart, in his collection of decisions, at the article of alluvion, where he contends that the alluvions on the shores of the sea, streams and rivers belong to the proprietor of the

riparious heritage, and that what belongs to the king in the sea or in navigable streams, are the *atterissements* formed suddenly.

This same author defines an atterissement to be "a heap of sand and slime that the sea or the rivers transport from one place to another, which changes their bed and shores."

Without examining whether the distinction laid down by Denizart between *alluvion* and *atterissement* be strictly correct, whoever is acquainted with the river on whose shore the contested batture is formed, will agree that the term atterissement, as defined by Denizart, is still more applicable to it than that of alluvion. The *Mississippi* carries down sand and slime in great quantity and forms battures not indeed in an *imperceptible* manner, as the term alluvion implies, but *very visibly*, and so quickly that a single swell of its waters deposits usually nearly a foot of slime on the whole surface of a batture, insomuch that the course of the river is continually changing.

But *Denizart* is in a glaring error in applying the spirit of the royal edicts, already cited, merely to atterissements. We see in all the edicts enacted on this subject that the sovereign claims as his property, not only the atterissements, but also the *accretions* formed on the borders of navigable rivers. Now, what is here meant by accretion *(accroissement)* according to the learned compiler of the department of jurisprudence in the *Encyclopædia?* "Accretion," says he "is formed in various ways: the accession of which we have spoken above, is a real accretion; *alluvion* and *atterissement* are also species of the same."

The word *accroissement*, used in the royal edicts, is therefore a generical term comprehending that of *alluvion*. Nay, it is used there rather as synonimous with alluvion, for *accroissements* and *atterissements* are there spoken of as things separate and distinct.

Finally, in order to refute still more completely the opinion of *Denizart* and others who may have erred as he did, we

find in the edict of the 15th of *December*, 1693, the word *alluvion* itself expressly mentioned.

"*Lewis*, &c. greeting. The right of property which we have on all the navigable rivers of our kingdom, being incontestably established by the laws of the state, as a consequence and necessary appendage of our sovereignty, the kings our predecessors and ourselves, have, from time to time, ordered researches to be made of the isles and accretions which formed themselves thereon, &c.

"For these reasons, by the advice of our council, and with our certain knowledge, full power and royal authority, we have, by these presents, signed with our hand, said, decreed, and ordered, and do say, decree and order as our will and pleasure, that all detainers, proprietors or possessors of isles, islands, attérissements, *accretions*, ALLUVIONS, rights of fishery, tolls, ferries, bridges, mills, ferry-boats, packet-boats, buildings, and rights on the navigable rivers throughout our kingdom, who shall produce titles of property or of possession anterior to the 1st of *April*, 1566, shall be therein maintained," &c.

But be it as it may as to the error of *Denizart*, and the opposition of his opinion to that of *Pothier*, whose authority is in every respect superior to his, we find both their opinions reconciled with regard to the point in question, by the explanation given by *Larasle*, the compiler of the department of jurisprudence in the *Encyclopædia*, at the word alluvion.

"It is to be observed," says he, "that to acquire by right of alluvion, two conditions are requisite: 1st. That the accretion be formed slowly and imperceptibly, so that one cannot discern the time when each portion of the alluvion was joined and consolidated with the heritage. 2ndly. That the heritages by virtue of which a claim is laid to *alluvion* be contiguous to the river, so that the bed on which it rolls appears in a manner to form part of the said heritages; for if they are not immediately bordered by the river, *but have for their boundary an intervening causeway or road*, that part which the river leaves uncovered between its bed and the

road cannot belong to the owners of the heritages situate on the other side of the road; *those lands belong to the king along navigable rivers*, and to the lord of the manor respectively, along such as are not navigable. Numerous edicts, ordinances, and letters patent have declared that all isles, islets, atterissements and *accretions*, belong to the king; excepting such as were possessed by the riparious proprietors in virtue of titles anterior to the year 1566.—See the edicts of 1663, 1668, 1670, 1693 and 1710."

Thus, though the authority of *Denizart* cannot be set in opposition to the formal expression of the law, which ordains that all manner of *accretion*, and namely *alluvions*, on navigable rivers, belong to the king; the case of the existence of a causeway, or a publick road, on the border of the river, forms an exception in favour of which all opinions may be reconciled.

.....

SECOND POINT.

"*The plantation bordering on the limits of the city of New Orleans, was sold by the king to divers persons, in* 1763, *when the batture lying in front of that land already existed.*"

On this point of fact the testimonial proofs are such as to leave no doubt. Old and respectable inhabitants of *New Orleans* have solemnly attested it.—Therefore, considering that batture as an alluvion, formed on a navigable river, without reference to any other circumstance, we may apply to it the expressions of the royal edicts above cited, and the authority of *Pothier*, to establish that that *alluvion* or *accretion*, belonged to the king of *France*.

THIRD POINT.

"*Between the batture and the land sold, lay a royal road and a levee, which were then, and have still remained publick property.*"

This fact is established not only on the most respectable testimonial proof, but on the most authentick documents, to wit, on the official and judicial acts done at the time when the king sold the land lying contiguous to the limits of *New Orleans*.

That land belonged to the *Jesuits* during about 37 years, when, in 1763, their property was seized and confiscated to the use of the crown of *France*. The *Jesuits*' title being extinct by that confiscation under which their lands returned to the demesne, it is needless to take any notice of it. It no way affects the title arising out of the subsequent sale which they thought proper to make of that land.

The primitive title of *Jean Gravier* and of those from whom he derives, is then the sale made by the king in 1763, of the land contiguous to the limits of the city of *New Orleans*.

With a view to that sale, the land of the formerly *Jesuits* was surveyed by order of the king, and a process verbal of the survey was drawn up, conformably to which the purchases were declared. In that proces verbal, and in the one afterwards drawn up for the purpose of dividing the land into lots, and giving to each purchaser the portion assigned to him, it is stated that the boundary marks of the land sold were fixed at *six toises five feet from the middle of the levee that restrains the overflowing of the river*, that is on this side of the royal road which had already existed during a number of years in front of the gate of the city; so that the royal road (the same that exists at present) separated the purchased land from the river. This fact, which is clearly established in those proces verbals, is further confirmed by the deposition of the engineer *Mansuy*, who drew a plot conformably to those proces verbals, to supply the loss, as it appears, of

the plan drawn at the time by the engineer *Olivier Devezin.*

This circumstance is the more strongly established as herein reason accords with the fact. It could not be the king's intention to sell the road extending to the city whose streets were not more frequented than that road had been for several years. That high road was publick property, and as such could not come into the possession of an individual, without giving that individual a right to dispose of the soil for any private purpose, which, in this case, is repugnant to the principles of publick right.

It appears that it was attempted to be proved on behalf of *Gravier*, that the custom of the colony of *Louisiana* was, that the proprietors of plantations should leave a high road on the border of the river; that consequently the purchasers of the *Jesuits'* land lay under this obligation equally with others; and that the road already existing, in front of the land by them purchased, was to be considered as supplying the place of the one which they would have been obliged to make, if it had not existed.

This is a false application of a general usage to a very peculiar case. The titles of land in *Louisiana* derive almost universally from primitive grants made by the sovereign. Those grants expressed that the grantee was to fulfil certain conditions, and amongst others that of making a publick road on his land. But here a grant is out of the question; the subject matter is a *sale*, and wide is the difference between a grant and a sale, both in principle and effect....The lands which were granted in this colony were uncleared lands in a state of nature. No road or other accommodation existed on them. The king, therefore, in granting them stipulated that the grantee should supply the publick with a road: the grantee made this road at a reasonable distance from the river, nearer or further off, as he thought proper, and sometimes stopped up the old road and opened a new one; for provided there were a road convenient to the river, he fulfilled his conditions. The case here is entirely different: it is not a grant of uncleared land as far as the river; it is the

sale of land already made valuable by industry, in front of which runs the high road. That road makes no part of the land sold: the purchaser of that land has no right to encroach on it: it is publick property.

It is here an utter absurdity to suppose that the high road in front of the purchased land was implicitly sold with that land. For it would follow that the purchaser might convert the road to his private use, without being under any obligation to supply any other road; since his deed of sale does not contain the condition, found in grants, that he shall make and keep up a high road.

It appears that a construction favourable to the claim of *Jean Gravier* was attempted to be given to the expressions of the proces verbal above referred to, wherein it is said that the land purchased by those from whom *Jean Gravier* derives, has so many acres in front *on the river;* and that it was contended that this expression meant that the land was bounded by the water. But those words, it is evident, have no other meaning than to designate the situation of the land. A house said to be situated on the sea need not, to make the expression correct, have its walls washed by the waves. A plantation may with propriety be said to be situated on a river, though it be separated from it by a high road. The king of *France*, as we have seen, was, before the confiscation of the *Jesuits'* property, proprietor of the alluvion which began to be formed in front of their land; yet it is probable that the plantation of the *Jesuits* was said *to have its front on the river.* Those expressions must in all cases be understood in a sense that agrees with the fact. Now, the fact is that there existed a royal road and a levee, along the river in front of the land in question; that consequently that land did not extend as far as the water, and that in reality the boundary marks of the front of the lots sold by the king were laid at forty-one feet from the centre of the levee. The lots sold were to have fifty acres in depth, beginning from that boundary: all encroachments on this side, or on that side, of those fifty acres is an usurpation.

Thus then at the period of the sale of the land at present possessed by *Jean Gravier*, the king of *France* was proprietor, not only of the batture, alluvion or accretion already formed in front of that land, but also of the royal road which ran along the border of the river. He had acquired the property of said batture by the mere circumstance of its being formed on a navigable river, according to the expression of the royal edicts already cited; and even though that law had never existed, yet he would have acquired the same property as proprietor of the royal road and of the levee which was really the ground bordered by the water, or riparious. Finally, that property incontestably accrued to him by the concurrence of those two circumstances, according to one of the authorities referred to above.

.....

FOURTH POINT.

"*The alluvion situate in front of the suburb of St. Mary has never ceased to be part of the sovereign's demesne.*"

It is evident that when *France* ceded *Louisiana* to *Spain*, the right of the king of *France* to the property of all the alluvions then formed on the *Mississippi* was conveyed to the king of *Spain*, and that if the king of *Spain* had thought proper to avail himself of that title, he might have remained proprietor of all those new grounds.

The king of *Spain*, through liberality towards his subjects, left to the inhabitants of the borders of the river, in general, the quiet enjoyment of those new grounds; and for the encouragement of agriculture in this colony, which was as yet in its infancy, he constantly permitted them to be converted into cultivated fields, not even at any time hindering the proprietors of plantations in front of which they were formed, from altering the scite of the high road, in order to take possession of them. Hence it follows that the battures already formed at the period of the cession of this colony to *Spain* are now become the property of the riparious inhabitants by

right of long possession, as securely as those formed since are their property by the *Spanish* laws. But has this general dispensation of the king of *Spain's* beneficence admitted no exception? Is there no example of his having reserved to himself the rights he had to the alluvions, the property of which was transferred to him by the crown of *France?* Surely there is at least one instance of this, in the case of the batture in front of the suburb *St. Mary*. The conduct of the king of *Spain* with regard to that batture evinces his intention to retain his right to it; and his motive is very obvious. That batture had for several years supplied the wants of the publick, and particularly those of the inhabitants of the city of *New-Orleans*. It was there they got earth for building, and for raising their grounds; there they stored wood for fuel, fences, plank, timber for building, &c. it was a ground of general utility. It was indispensably necessary to government itself, for raising the streets of the city, for the levees, the fortifications, and for other publick uses. The king of *Spain* therefore retained his right to that alluvion as its situation rendered it invaluable to his subjects and to himself. It was his will that it should remain publick ground, and he constantly opposed all encroachments attempted by individuals. He caused ordinances to be proclaimed to that effect, and even caused to be demolished the buildings which several individuals had ventured to construct on it. In short, to the time of the retrocession of the colony, he never ceased to act, with regard to that batture, as its proprietor. All these facts are established on the most authentick evidence both written and oral.

It is then incontestable that the batture situate in front of the suburb *St. Mary* was a part of the demesne of the crown of *Spain* at the period when that crown ceded back that colony.

FIFTH TOINT.

" Neither Jean Gravier, nor those from whom he derives his title, ever possessed the batture in question; and Bertrand Gravier himself, at the time of his laying out a suburb in front of his plantation, declared that he had no claim to the alluvion."

It is a fact incontestably proved that neither *Jean* nor *Bertrand Gravier*, nor any of those through whom this claim is derived, ever possessed a single inch of the batture in question. It is further remarkable, that they never set up any title to that effect, and that not one of the encroachments attempted on that batture, was made by them until the year 1804, at which period *Jean Gravier* resolved, for the first time to claim it. But a circumstance of still more weight, is that *Bertrand Gravier* himself, when he converted the front of his plantation into a suburb, declared that he considered himself discharged from the duty of repairing the publick road and the levee, because the front of his land was become publick property; so that since that period the government and the city had been at the expense of keeping the road and the levee in repair. It is also to be remarked that at the time of *Bertrand Gravier's* death in 1797, it was so well understood that he could have no pretension to the batture in front of the suburb *St. Mary*, that not only no mention is made of it in the inventory of his property, but that it is excluded from his property by the very expressions of that inventory, and especially by those of the valuation of his plantation of which here follows the literal translation:

" About thirteen acres of land, of which the plantation is estimated to consist, including the garden ground; *from which land the most useful portion has been retrenched on the front*, so that what remains of it are the lowest lands which close towards the depth, and are surrounded with bad fences; a part of the best land on the side having been sold to Mr. *Navarro*, to Mr. *Percy*, and to the negro *Samba;* which thirteen arpents, with twelve negro cabins, have been estimated by the appraisers at the rate of one hundred and nine-

ty dollars per acre in front by the existing depth, amounting in all to two thousand four hundred and seventy dollars."

All these facts would not give a title to the sovereign, if he had it not already, neither do they add any thing to the title he has; but they evince that the opinion of *Bertrand Gravier* and the opinion of the publick perfectly accorded with the truth, and that the pretensions of his successor are as extraordinary as they are ill founded.

The undersigned counsel concludes from the above discussion, that the *United States* are now the real proprietors of the batture, accretion or alluvion, situate in front of the suburb *St. Mary;* and that if they claim it, the courts of justice cannot but acknowledge and confirm their title.

Deliberated at *New-Orleans*, on the 21st of *August*, 1807.

P. DERBIGNY.

EXAMINATION

OF THE

TITLE OF THE UNITED STATES

TO THE LAND CALLED

THE BATTURE.

BY EDWARD LIVINGSTON, ESQ.

.....

THIS title is supported—

FIRST. By an incorrect and imperfect statement of facts.

SECOND. By an assumption, that the question is to be decided according to the principles of the *French*, not those of the Imperial or *Spanish* law.

THIRD. By an erroneous statement of that law.

The whole fabrick of this imaginary title is founded upon the statement which supposes that in the year 1763, the sales of the Jesuit's property were made only to the road, and that they were bounded by a front line running on the inside of the levee and road. It will be clearly demonstrated that this position is totally unsupported; but that the contrary, to wit, that the sale of the Jesuits property under which we claim, were bounded on *the river*.

In order to understand fully this point, it is necessary to remark, that all the grants made by the *French* or *Spanish* governments, without, as it is believed, any exception were bounded *by the river*, but all expressed under the general terms *face au fleuve*, or *face sur le fleuve*, or sometimes under the more general terms *face* alone, which according to the testimony of all the surveyors, related to the place on which the lands were laid out, as the *river*, *bayou*, &c. So that if the lands lay on a *river* or *bayou*, the word *face* alone would, according to the general construction of the country, give a

front on the *river* or *bayou*, unless there were some restrictive words which expressed the intention of the parties to be different.

It appears as well by testimony as by the express admission of the parties* in this cause, that the *soil of this road* was not reserved to the king, but merely the *use of it* vested in the publick, since the proprietor made and changed it at his pleasure, as the encroachment or alluvion of the river, or as his own convenience required. There is every reason to believe that the grant to the *Jesuits* was in the usual form and was bounded by the river, but we are not left to presumption on this point. Though the original grants to the *Jesuits* be lost, yet in the proceedings which took place in the year 1763, preparatory to their division and sale, we find a certificate of the proper officer to the following effect:—

"In the year 1763, on the 14th day of *July*, we the undersigned, counsellor of the king, inspector of the roads, and surveyor general of the province of *Louisiana*, certify that by virtue of the orders of Mr. *Dobadie*, commissary-general of the navy, &c. dated this 13th instant, by which we were directed to transport ourselves to the habitations of the persons calling themselves *Jesuits*, &c. there to examine the titles and papers relative to the possessions of the aforesaid persons, which we found *ought to contain thirty-two arpents of front on the river St. Louis.*" And in the same proceedings, is a lease made by the *Jesuits* of a part of their land, in which the lessee binds himself to make the levee and the road.

The original grant then was like all others bounded by the river, and the defendants in their case have taken pains to state that the batture or alluvion then existed. This perhaps

* Vide Derbigny's opinion, 3d point, page 300. "The grantee made this road at a reasonable distance from the river, nearer or further off as he thought proper, and sometimes stopped up the old road and opened a new one, for, provided there were a road convenient to the river, he fulfilled his promise."

was the fact,* but to a very inconsiderable extent. But this will make no difference in the case; for if there was an alluvion in the year 1763, whether it had prior to that belonged to the king or to the Jesuits, at that period the whole plantation with its batture became the property of the crown by the forfeiture of the Jesuits' estate, and the king at that time ordered the estate to be divided and sold....Did he grant the *whole?* or did he reserve the batture and the road?

Let us examine this point—

By the proceedings before referred to, it appears to have been the intention to divide and sell "all the said lands."†

By the adjudication, it is granted with "all† its members and appurtenances without *reserving any thing:*" by the adjudication of the sixth lot (the farthest extremity of the land and not now in dispute) one † acre was reserved to the king, so that it appears whenever the king wished to retain any part, his officers took care to insert the reservation in the deed.

Besides this, it is stated in the case, and proved on the trial, that governor *Carondelet* had at three several times directed *Gravier* to make the road and the levee, once by a letter which not only ordered him to repair the levee, but carries some evidence of his having done it before, because he speaks of his "*known exactitude.*"‡ Now if the road and levee were reserved to the king, what had *Gravier* to do with working it? or if the road and levee were not comprehended in the sale of the *Jesuits'* property, and as they allege in this case, had been constantly considered as part of the de-

* Recent discoveries have made it probable that a great part of the land lying outside the levee, which was called alluvion by the witnesses, was really as much original soil as any other part of the country, since in digging a canal since the judgment, the stumps of a grove of cotton trees have been discovered in their natural position about three feet under ground, and measuring two feet in diameter.

†‡§ See Note A. ‡ See Note B.

mesne, how is it that *Baron de Carondelet* was ignorant of this circumstance?

It was therefore clearly the intention of the king not to reserve any thing, but on the contrary to sell the whole plantation, of which the alluvion formed a part. What motive could he have had for such reservation? The defendants and their counsel say, for the use of the city*—but a reservation to the crown would have been of no use to the city, and if this had been the intent the reservation would have been accompanied by a grant to their use. Let it also be remembered that the *Jesuits'* plantation consisted of thirty-two *arpents* in front, of which *Gravier* possessed only thirteen; the residue was sold to different persons at *the same time*, under *the same circumstances* and by the *same words* with those employed with respect to *Gravier's* part; yet the batture on the nineteen remaining acres, infinitely more extensive than that now in question, has been uninterruptedly held by the proprietors of the original soil; the publick have never that I have heard pretended to it; nay the very persons most clamorous against my title, now hold property to a very large amount on those very battures. If, therefore, my title be defective and theirs good, we must look for the difference in something subsequent to *the sale* of the *Jesuits'* property under which we all hold.

The error (and when made by persons who so well know the customs of the country as the defendants it deserves an harsher name;) the error, lies in representing the line always drawn in front, generally within the levee, as a front boundary; when they know, and their own witness (one of the defendants, the surveyor-general of the province) stated that such front line was drawn not to mark a boundary be-

* The Jesuits possessed a tract of land one league and a half above the town on the other side of the river. Unfortunately for this argument it happens that this land is sold precisely in the same terms with those used with respect to the plantation near the city. See Note C. *Did the king reserve this also for the use of the city?*

tween the plantation and the river, but to measure the extent of its front; which was always done on a direct line, and never followed the windings of the river; and that the stakes placed on the side lines were not intended to mark their extent towards the river, but to show the direction of those lines, whether they opened, closed or were perpendicular to the river.

The certificates in note D, show this to have been the universal practice, in all the surveys under the *French*, *Spanish* and *American* governments.

But even if this line, contrary to the universal and uninterrupted usages of the country, to the whole course of evidence in the case, and finally, to the dictates of common sense; if contrary to all these, the line of *admeasurement* is to be turned into a line of *boundary;* yet it will avail them nothing, for it so happens that in this case the line of admeasurement crosses the levee a few toises from its commencement and continues *on the batture outside of the levee during the whole of its course through the part now constituting the suburb St. Mary.** So that even if this notable discovery made by the corporation and their counsel be true, they will not derive from it the pleasure of disturbing *Gravier's* possession by a claim from the *United States*; for their great argument of an intervening road and levee, totally fails them in this instance. But they will have the gratification of disturbing almost all the other titles in the country; for most of those lines of admeasurement are in other instances drawn within the levee and road: so that if this principle be admitted, scarcely a single plantation will be bounded by the river; and congress may make it inaccessable whenever they please to most of the inhabitants, for not one in an hundred have any exclusive possession between the road and the river.

* This appears from a map which has been carefully protracted by Mr. Lafon from the *proces verbal* of the Jesuit's survey; a copy of the map and *proces verbal* are filed for the inspection of those who may desire it in the office of Mr. Pedesclaux.

A conclusive proof however, that the river was the front boundary of the *Jesuit's* plantation, as well since as before the division and sale of 1763, has been discovered since the trial.

Under the *French* government a general plan was kept by the surveyor general, on which the lines of each concession were distinctly and accurately laid down. This was called the *Plan Terrier*, and the original or a copy was delivered to the *Spanish* surveyor general on the transfer of possession. He delivered copies of this plan to his deputies, and it was always considered by the *Spanish* government as an authentick record. On an extract of this map, which was thus delivered in 1795, the plantations above the town for the distance of about four leagues, are all delineated; in all of them the side lines extend to the river, which is laid down in every instance as the front boundary.

Among these plantations is that of the *Jesuits*—On the plan are marked the names of the persons who then held under the sales of 1763. But no such front line as Mr. *Derbigny* has imagined is found on this plan—no road as the boundary—nothing to distinguish it in this respect from the neighbouring plantations, which as I have said, are all bounded on the river.

Yet this plan was given in 1795, at a time when the alluvion was considerable in extent, seven years after the suburb was laid out, and long after the time at which, as is now pretended, *Gravier* had abandoned his right.

This plan too, completely disproves the idea of a reservation of the front part by the sales of 1763. For it delineates with great care and precision, the reservation of a small part near the town—designating minutely the difference between the old limits of the *Jesuits'* plantation on the side next the town, from those established in the sale of 1763. If then any reservation had been made by the king of the alluvion or land in front, would it not have been noticed with the same care as has been shown as to the lateral lines?

This document is alone so convincing that if an engraving can be prepared in time it shall be annexed to this work.

It is then I think proved—

FIRST. That the ancient habitation of the *Jesuits* bordered on the river. And this fact is further proved by their having repeatedly changed the levee beyond Madame *Delar's*, in order to *take in* the alluvion.*

SECOND. That the sale of their property was made without any reservation.

THIRD. That by the sale of 1763, no new boundary was fixed between the front of the habitation and the river; in other words, that the several subdivisions as well as the original grant extended to the river.

It is therefore of no consequence whether there were or were not an alluvion formed at the time of the sale of the *Jesuits'* property. On either supposition, the grant going to the river gives us all within its lines, whether alluvion or original soil.

Second error in fact—

In the defendant's case, it is stated, that the batture called "the *Jesuits*" after the transfer of possession in 1767, continued to be considered as a part of the "*royal demesne;*" and as such was of publick utility in supplying earth, without any claim being made to it by the proprietors or purchasers of the *Jesuits'* plantation, either before or after the cession.—And in the counsel's opinion, he says that it "never ceased to be part of the *sovereign's demesne*," and strangely asserts that "it is a fact *incontestably proved*, that neither *Jean* nor *Bertrand Gravier*, nor any of those through whom this claim is derived, ever possessed a single inch of the batture in question. It is further remarkable, that they never *set up any title* to that effect." p. 305.

It is somewhat extraordinary that this statement should be made by that very corporation, which for three years had

* The existence of the old levee as well as the map above referred to, prove this fact.

been contending in a court of justice, that the premises belonged to the city of *New Orleans*, and that the same counsel who during the whole of that period asserted in three several arguments, the unequivocal right of the corporation, should now as boldly pronounce that they never had any title, but that it always belonged to the *United States*.

Did the learned counsel give his true opinion to the corporation, when he was first called on to defend their cause?

If he did, how can the corporation justify the thousands of dollars they have expended in defence of a claim which their counsel must have told them was unjust?

Did the learned counsel suppress his true opinion, and flatter the city with the hope of gaining what he knew did not belong to them but to the *United States?* A case not to be supposed.

Or has the learned counsel after three years study of the cause changed his opinion of its merits?

A revolution then, of three other years, may perhaps prove that his second opinion was as erroneous as his first, and if the United States have the same confidence as the corporation in the advice which is so kindly offered them, they may be induced to spend as many thousands as the city have done, and with equal success.

The error of this statement of facts appears—

First. By the allegation of the persons themselves who make the statement, and those allegations, too, on record.

On the 16th of *March*, 1805, the mayor in behalf of the city, filed a bill to perpetuate testimony in this case, in which they state, "that *Bertrand Gravier* was the owner of the plantation; that he had laid out the front part into lots, in 1788; that *after* the said lots had been sold he considered himself as *no longer* bound to preserve the levee; that on being called on by the governor to repair the road, he declared that having converted his plantation into a fauxbourg, and sold the line of the lots on the side of the river, whatever intervened between those lots and the river belonged to the publick, and was *no longer* his concern; that *in conse-*

quence of this formal relinquishment, the Spanish government immediately caused the necessary repairs to be made, and the *inhabitants* of *New-Orleans have ever since*, without hindrance, &c. possessed and enjoyed the same premises, &c."

In their answer to the petition of *Jean Gravier*, the mayor, aldermen and inhabitants, repeat the same idea. After denying the right of *Jean Gravier*, they say, "that the truth is that sometime before the death of *Bertrand Gravier*, the first owner of the plantation on the front of which the suburb *St. Mary* was established, he the said *Bertrand Gravier had abandoned and himself acknowledged in an unequivocal manner to have abandoned* all the above mentioned parcel of land; that *in consequence of such abandonment*, the high way and levee have been maintained and repaired *then and afterwards*, till this moment, either by the *corvees publique*, or at the expense of the city; that *since that time* till now, the *inhabitants of this city* never ceased to have a peaceful enjoyment of the said parcel, either to place different wood-yards or for unloading flat bottomed boats and other rafts, *with permission* of the *corporation*." And their answer concludes by avowing, that "the city council had erected a cabin on the land to lodge a guardian, and that they had caused the earth to be digged and carried away to repair the levee."

Yet with these allegations on record, in which they derive a title under *Bertrand Gravier* by virtue of an abandonment, in 1788; in which they say *the land belongs to and is possessed by the city;* the corporation in their statement do not blush to assert, that the same land had continued ever since the year 1767, to be considered as part of the *royal demesne*, and that too, as they say, under the name of the "*Jesuits'* batture."

If it was royal *demesne*, how could the inhabitants of the city have enjoyed it? Was it not as strictly forbidden under the *Spanish* as under the *American* government, to intrude on the publick property? If it was royal *demesne*, how did it acquire the name of "*Jesuits' batture?*" If it was royal *demesne* how could the corporation have the right

to give *permission to the rafts and boats to unload*, or for the dealers in lumber to deposit their wood there? Thus we see the allegation contained in the case, is not only at war with the truth, but is also expressly contradicted by the declarations of the defendants themselves *upon record*. Let us now examine the residue of this sentence, viz. "that no claim was made to the premises by the proprietors or purchasers of the *Jesuits*' property, either before or after the cession;" and the still stronger assertion of the counsel in his opinion, that it was "a fact incontestable proved that neither *Jean* nor *Bertrand Gravier*, nor any of those under whom this claim is derived, ever possessed a single inch of the batture in question. It is further remarkable that they never set up any title to that effect." I cannot comment upon the subject of this statement as it deserves, without departing from that rule of moderation which I have imposed upon myself in pursuing this enquiry: I will, therefore simply state the proofs by which the reader will be enabled to appreciate the value of these allegations—allegations which ought to have been maturely weighed before they were hazarded by the corporation, or re-echoed by their counsel. They should have considered, not only from the regard always due to truth; but from the reflection that this case was to become the ground-work of an application to the *United States*, to prosecute their claim at a great expense to them and with great inconvenience to the individuals concerned; that the doctrines contained in it, give rise to a most important and serious question, which, if resolved in the manner they seem to desire, will not only forever deprive the town of this species of property in the very city itself, but also ravish from the inhabitants all the alluvions that have been formed since the establishment of the country. It ought also perhaps to have occurred to the counsel, if not to his clients, that after the Superiour Court had given an unanimous opinion in this important cause, it was hardly treating the judges with proper candour not to state with more care the evidence upon which they pronounced. The corporation

say that the purchasers of the *Jesuits'* plantation never *claimed* the batture in front of the suburb *St. Mary;* and their counsel asseverates the same thing as having been incontestably proved. Why then in the passages I have quoted, did the corporation claim under *Gravier*, by virtue of his abandonment? Abandonment supposes right, possession, or at least claim of right. If *Gravier* never claimed, then *Gravier* never could abandon. Are the allegations of the corporation in their pleadings, or in their case to be believed? *Gravier* "never claimed," say the defendants and their counsel; yet he sold a lot on the batture on the 12th of *April*, 1794, to *C. F. Girod*, on the same day another to *Wiltz*, on the same day a third to *John Scott*, on the 12th day of *January*, 1795, two others to Mr. *Pierre Foucher:* reserving in the three first the right to dig earth for his brick-kiln. These deeds were *all on record*, were all produced on the trial, and could not have been forgotten. "*The batture was royal demesne, and Gravier never set up any claim to it.*" Yet governor *Carondelet*, in a letter dated the 10th of *March*, 1794,* commands him to make the levee and compliments him on his former punctuality. He repeats this order at two different times; once by Mr. *Livaudais* and once by Mr. *Mentzinger*, and according to the uncontradicted testimony of Mr. *Segur* and Mr. *Laroche*,† he thought it necessary to ask Mr. *Bertrand Gravier's* permission, and, after his death, that of *Jean Gravier*, to lay the rafts of royal masts on the batture.

What then becomes of this "fact so incontestably proved?" But I might have contented myself with the consultation itself, to show the error of its statements on this point. At page 300 of the opinion, the third position of the counsel, is, that between the alluvion and the land sold (viz. the sale in 1763) "lay a royal road, the same that still exists, and a

* See note B. † See note G.

levee, both which *were then and have still remained publick property.*"*

Here we find a broad assertion that the levee and the road were then, viz. 1763, and still are, publick property; yet at page 305, of the same opinion, we find the old ground of *Gravier's* abandonment resorted to, and the date of the publick title fixed to the laying out the fauxbourg, (1788.)

But a circumstance of "*still more weight*" (says the counsel) "is, that *Bertrand Gravier* himself, *when he converted the front of his plantation into a suburb*, declared that he considered himself discharged from the duty of repairing the roads and the levee" [what duty if the road and levee had ever since 1763 been publick property? or how could he be *discharged* from a duty which according to the counsel's third position must have been always that of the publick] because the front of the land was now become publick property: so that *since that period*, the government and the city have been at the expense of keeping the road and the levee."

How difficult is the support of error! since even the acknowledged abilities of the learned counsel have not enabled him to write ten pages, without contradicting the witnesses, contradicting the records, and contradicting himself.

Third error in fact—

In the case stated, page 288, the defendants alledge "that when the sales were made" (24th *November*, 1763) "*Louisiana* still belonged to *France*, and was under the dominion of the *French* laws." On the 3d day of *November*, how-

* Yet Mr. Laveau Trudeau declared on oath that he thought Gravier had a right to sell the batture: and that when called on to ascertain his upper limits, he had began the survey from the middle of the levee, and not from the inside of the road as he would have done if the road had been publick property or the boundary of the land.—Did the counsel forget this testimony? or was the *Surveyor-General* as well at the *Governor* ignorant of this *notorious fact?* See his examination, note E.

ever, in the preceding year, *Louisiana* had been ceded by *France* to *Spain**; and although possession was not immediately taken, yet it will not be pretended that the king of *Spain* could acquire any rights by virtue of the *French* laws, supposing them to be as they are stated by the defendants.

The whole then of the title in the *United States* so lately discovered, so contradictory to that which the parties who now support it, have alleged, must fall with the discovery, that at the time our title commenced, the king of *France* had abandoned the sovereignty, and of course could by virtue of this pretended prerogative claim no right to seize the alluvion, and shut out his subjects from the river on which he had bounded their grants.

Having pointed out some of the errors in fact in the defendants statement, and shown that this cause is to be determined according to the *Spanish* laws; I ought, perhaps, from an examination of those laws to prove that they give the alluvion in all cases to the proprietor of the adjacent soil; but that point seems to be conceded not only by implication in attempting to substitute the *French* for the *Spanish* laws, but expressly in page 303 of the opinion, where it is said that the alluvions formed since the cession, are the property of the front proprietors, by the *Spanish laws;* but to remove all

* If it should be objected that this argument injures the title of Gravier by showing that the king of France had no right to sell to those under whom he claims; there are four answers, all of them conclusive:

First—That the king of France may be considered, during the interval between the cession and the delivery of possession of the country, as only the trustee for the king of Spain; and that, therefore, all his acts permitted and not revoked by the latter power on taking possession, are valid.

Second—That though not *de jure* yet *de facto*, France was sovereign of the country: therefore, all sales made by the actual possessor to a *bona fide* purchaser, are valid.

Third—That we are now in possession, and that the United States cannot prevail by the weakness of our title, but must show a conclusive one in themselves.

Fourth—That by the fundamental laws of Spain, the king could not acquire this species of property.

doubt upon this point, I refer to the authorities cited in note F. *post.*

But although I have clearly shown, that this question is not to be decided by the *French* but the *Spanish* law, I can with ease deprive my opponents of even the semblance of an argument by showing, thirdly, that both by the general laws of *France* and by special grants, the alluvions of the *Mississippi* belong to the proprietors of the adjacent soil, and not to the king.

The right of the adjacent proprietor is so consonant to the principles of natural law that it would require strong arguments to prove that any laws could permit a sovereign, after having bounded his grantee on the river, to cut him off from its use by seizing on the alluvion which might be formed on its banks. Let us examine carefully before we pronounce, that the *French* jurisprudence is liable to this reproach.

The laws relied on by the defendants, are the edicts of 1683, 1693 and 1710, and the opinion of *Pothier.* Of the edicts, the counsel has selected that of 1693, as the most favourable to his position. Let us examine this edict, without, however, subscribing to the doctrine, that any of the king's edicts could without further formality, change the general civil law of the kingdom, and with the observation that many of the provinces had their particular privileges, which they always preserved and which were enforced by the tribunals. In the very instance now before us, long after this edict, it is held by *Denizart*, by the authors of the jurisprudence of the *Encyclopoedia*, and other authorities which I shall cite, that the law of the land is the reverse of that said to be enacted by the edict.

The ideas I had formed on this subject are confirmed and strongly expressed by *Portalis*, in his preliminary discourse to the civil code :

" Sous l'ancien régime, la loi étoit une volonté du prince —cette volonté étoit adressée aux cours souveraines qui étoient chargées de la verification et du dépôt des lois—la loi n'étoit point exécutaire sans un report avant d'y avoir été

vérifiée et enrégistrée—La vérification étoit un examen, une discussion de la loi nouvelle. Elle représentoit la déliberation qui est l'essence de toutes les lois—l'enrégistrement étoit la transcription sur le régistre de la lois vérifiée—les cours pouvoient suspendre l'enrégistrement d'une loi, ou même la refuser—elles pouvoient modifier la loi en l'enrégistrant, et dès lors ces modifications faisaient partie de la loi même. Une loi pouvoit être refusée par une cour souveraine et acceptée par une autre—elle pouvoit être diversement modifiée par les diverses cours."

" Under the former government the law was the will of the prince—the expression of this will was addressed to the Superiour Courts, which were charged with the verification and deposit of the laws. No law could be executed in any jurisdiction until it had been verified and registered therein. The verification was an examination or discussion of the new law—it represented that deliberation which is essential to all laws—The registry was the act of transcribing the law thus verified on the records. The courts might suspend the registry or even refuse it—they might modify the law when they enregistered it, and from that moment those modifications became part of the law itself. A law might be refused by one Superiour Court and received by another—and it might be differently modified by different courts."

The edict declares that the king has an incontestable right upon *(sur)* all the navigable rivers, and that he and his predecessors, have caused researches to be made of isles and accretions *(crements qui s'y sont fait)* which had been made *therein*, and not *thereon*, as is translated in the opinion; and he confirms the ancient possessors of all islands, *atterissements*, *alluvions*, &c. in their possessions on paying certain dues to the crown. Now, in this edict I can find no declaration of any thing but that the king had an incontestable right upon the navigable rivers of his kingdom,* and that he

* Probably because the grants on those rivers, were not bounded by the river, as we have shown ours, in common with all the others in the country, to have been.

and his predecessors had claimed the islands and accretions or banks found therein, that is, in their channels or beds; but because the word alluvion is introduced in the list of property that is confirmed to the proprietors, I do not perceive that the king arrogates to himself a right to the alluvions which shall be formed upon the land which bounded on the river, and I can account for the word being introduced into this part of the edict, by supposing that it was the intent of the king to confirm to possessors of the islands not only original soil of these islands, but also the increase which they had gained or might afterwards gain by alluvion. This is a very natural construction, not only from the omission of this word in the declaratory part of the edict, but also because islands more frequently are increased by alluvions than even the banks of the rivers themselves. And thus the words of the edict will be satisfied without making it at war with the fundamental laws of the kingdom.

The only remaining authority is that of *Pothier*. I confess that the part cited would lead the reader to suppose that this writer meant to decide the question in all cases of navigable rivers; but a closer attention will perhaps discover an inaccuracy of expression, or an error unavoidable in some instances, even by the most correct writer whose attention is turned to so many points as are embraced by the valuable work of *Pothier*.

I apprehend that what is laid down here as a general proposition, applicable to all navigable rivers in *France*, is true as to those only; (and this may be the case, perhaps, with the greater number) where the grants have not been bounded by the river but by a fixed front boundary. I believe so, because if the doctrine of *Pothier* were understood in the unqualified sense in which it is quoted, the other writers whom I shall cite, and who all without exception, give a contrary opinion, would at least notice that of so celebrated a writer, if they supposed it differed from theirs on so important a point.

I am also inclined to this solution from the passage which follows in the 160th article, where he gives the reason why,

by the Roman law, the alluvion belonged to the adjoining proprietor :—

" It was (says he) by a kind of right of accession, that according to the *Roman* law the riparious proprietors, had, each one in his own right, the property of the islands which were formed in the river, and even in its bed, when the river abandoned it to take another course.

" The inheritances of these proprietors having towards the river an unlimited extent, and having no *other bounds but the river* and *which comprehended even the shores and all which was not occupied by the river*, the bed which had been covered when it ceased to occupy it was deemed to have made a part of those inheritances, and to be an accession to them.— It was the same thing with respect to the islands which were formed in the river ; these islands being nothing else but a part of the bed of the river which it had ceased to occupy."

" By the *French* laws the navigable rivers belong to the king ; the islands which are formed within as well as the bed when it is abandoned to take a new course, belong to the king ; the proprietors of inheritances on the bank cannot at all pretend to it, *unless they show titles of concession from the king*."

From these citations I think it appears that *Pothier* makes the right of alluvion to depend on the fact of the concession or grant being bounded by the river, since he gives the existence of such boundary as a reason why, under the *Roman* law, the proprietor was entitled to the alluvion, and declares that unless he has a similar concession he is not entitled to it by the French law. I have endeavoured, I know not with what success, to reconcile *Pothier* with the other *French* writers, some prior, and others subsequent to his work : every one of which, at least all that I have been able to consult, agree in the doctrine that the proprietor of land bounded by a river, whether navigable or not, is entitled to all the increase that may be produced by alluvion, but that *atterissement*, a word peculiar to the *French* jurisprudence, belongs in navigable rivers, to the king.

Alluvion is defined in the *French*, precisely as it is in the *Roman* and *Spanish* laws, to be an "increase of land, which is made by degrees *(peu à peu)* on the shores of the sea, of navigable and other rivers, by the earth which the water brings there." This definition is taken from *Guyot's Repertoire Universelle*, a work of great merit, compiled by upwards of forty counsellors, from different parts of the kingdom, and published in 1784. The whole article is transcribed in the margin,* and I deduce from it these important consequences :

* "ALLUVION. Accroissement de terrien qui se fait peu à peu sur les bords de la mer, des fleuves et des rivieres par les terres que l'eau y apporte.

"Le droit Romain met l'alluvion au nombre des moyens d'acquérir par le droit des gens, comme étant une espèce d'accession; en sorte que l'accroissement fait imperceptiblement demeure à l'heritage auquel il se trouve réuni. Cela est fondé sur la maxime qui veut que le profit appartienne à celui qui est exposé à souffrir le dommage.

"Cette disposition du droit Romain est suivie dans le royaume, excepté neanmoins en Frenche-Compte où l'on tient pour maxime que la riviére de Doux qui arrose cette province, *n'ote ne ni baille;* c'est-à-dire, qui celui dont cette rivière dominue l'heritage en l'inondant peut prendre son indemnité dans le terrein qu'elle laisse à découvert.

"Il faut aussi excepter les héritages voisions de la rivière de la Fère qui suivant une coutume locale d'Auverge, *n'ote ni ne baille.*

"L'article 195 de la coutume de Normandie porte que les terres d'alluvion accroissent aux propriétaires des héritages contigus à la charge de les *bailler par aveu* au seigneur du fief et d'en payer les droits seigneuriaux comme des autres héritages adjacens.

"Les coutumes de Sens, d'Auxerre et de Metz ont des dispositions semblable et sont admises pour de règle dans le droit Francois.

"L'accroissement fait par alluvion prend les qualités de fief, de de roture, de propre ou d'acquet que peut avoir l'héritage accru, et il est sujet aux mêmes charges.

"Il n'en seroit pas de même d'une augmentation arrivée subitement à un héritage par un débordement ou par quelqu' autres cas fortuit. Cette augmentation appartient au roi dans les rivières navigables et aux seigneurs haut justiciers dans les rivières non navigables." *Guyot's Repertoire Universelle, page* 113.

First—That the doctrine of *Pothier* is here shown, not to be the general law of France, but an exception to that law in the particular provinces, which are enumerated.

Second—From the part of these articles, which states the custom of Normandy to be, that the proprietors of the adjacent land shall have the alluvion, "*a lacharge des les bailler par aveu au signeur du fief et d'en payer les droits, seigneuriaux*," &c. that is, on condition that he shall make an acknowledgement (which is in the nature of homage in the English law) to the *feudal lord*, and pay his seignorial dues, &c. "The customs of *Sens*, *Auxerre nad Metz*, have similar dispositions, *and are admitted to serve as a rule in the French jurisprudence.*

Here then I think we may plainly discover, that if the king of France has any right to alluvions, he has them as *feudal lord*,* that even in lands held under this tenure, the proprietor would have a right to the property, paying the usual rents, and rendering the accustomed homage, but that in land not held under a feudal tenure, the king could have no pretensions to this accession of property, which would belong to the proprietor by the law of nature, to which this right is expressly referred by the Justinian code.

Should this reasoning be well founded, the dispute is at an end with respect to this property, which is expressly granted in *franc aleu*,† or *allodial tenure*, as we should express it in the language of English jurisprudence. "*Franc aleu*," as appears from the following definition taken from the "*Coutume de Paris*," page 144 "is an inheritance which is subject to no seignorial rights or duties, either honorary as fealty and homage, or pecuniary as rent, fifth relief, or others that may

* Since the first publication of this work I have found my reasoning on this subject confirmed by the highest authority—Portalis in his preliminary discourse to the second book of the French code, expressly refers this claim of the crown to a *feudal* origin—And moreover positively declares the whole law of alluvion to have been *settled* in favour of the adjacent proprietors long before the revolution.

† See note A.

be due as acknowledgements of the tenure from the superior lord; it is therefore that it is thus called *quasi liberum et solutum ab omnibus juribus.*"

The authority of the *Encyclopædia* is also cited to show a difference between the *Spanish* and *French* laws on this point. A very cursory examination of the article will show its misapplication to the defendant's case. The whole text, (for the defendants have only quoted as much as they think suits their purpose) reads thus:

"Alluvion is an increase of the ground which takes place by slow degrees, on the shores of the sea, on the borders of *fleuves* and rivers; occasioned by the earth which the water conveys to it, and which becomes so consolidated with the contiguous land that it forms a *whole with it—an identity.* The name of alluvion is also given to those lands which are slowly and imperceptibly left uncovered by the water.

"The *Roman* law places alluvions in the number of the means of acquiring according to the laws of nations, as being a kind of accession: that augmentation, being operated in a slow and imperceptible manner, remains to the inheritance to which it is found united.

"The portion which is thus added insensibly is not considered as a new land, it is a part of the old which becomes possessed of the same qualities, and it belongs to the same master—*in the same manner as the growth of a tree from parts of the tree*—and is the property of the proprietor of the tree. That right of increase by alluvion is grounded in the maxim of right, which bestows the profits and the advantages of a thing, to him who is exposed to suffer its damages and its losses.

"*The regulations of the Roman law on alluvion are generally followed in France*—the usages of *Metz*, of *Sens*, and of *Auxerre*, have on that subject precise regulations, which form their common law.

"But the province of *Frenche-Compte* must be excepted, where it is established as a maxim that the river *de Doux*,

neither gives nor takes away—that is to say, that the person whose inheritance is diminished by the inundation of the river, may indemnify himself by possessing himself of the land which it has abandoned.

" The same thing takes place on the inheritances bordering on the river de la Fère in Auvergne, where the local *coutume* establishes the same right.

" The alluvions which the sea produces on the lands which it bathes, also belong, as a right of increase, to the proprietor of those inheritances, who may also make levees or dykes to secure them.

" We must observe, however, that to acquire by right of alluvion, two conditions are necessary....

" First. That the increase should be made slowly and imperceptibly, in such a manner that it cannot be discovered in what time each part of the alluvion has been formed to and consolidated with the inheritance.

Second. That the inheritance by virtue of which the right of acquiring by alluvion is claimed, be contiguous to the river, in such a manner that the bed on which it flows, seems as it were, to be a part of the same inheritance; for in case it did not bound exactly to the river, and that it was bounded by a cause-way or by a road, the parts left uncovered by the river between its bed and the road, cannot belong to the proprietor of the inheritance situated on the other side of the road. Those lands belong to the king in navigable rivers, and to the feudal lords in those that are not so."

Here we find the Roman law expressly recognized, as being generally followed in France, with the exception of the districts enumerated in the former authority, and then follow the passages selected by the defendants, which in no sort whatever, weaken the effect of the prior passages of this authority.

They are—

First. That the alluvion must be formed slowly and imperceptibly, so that the time of the incorporation of each part with the original soil, cannot be discovered. When the

ingenious counsel can analize the different deposits, separate the sands of the Red river, the rich mould of the Missouri, from the clay and other various soils which the Mississippi receives from a thousand tributary streams; when he can dive into its turbid eddies, watch the moment of the precious deposit, and date the existence of each stratum of its increase; then this first branch of the authority he has cited may be applicable to his cause.

The second point, viz. that no proprietor can claim any alluvion, unless his lands are bounded on the river is true, not only in the French, but in the Roman and Spanish jurisprudence; and therefore it ought certainly not to have been cited in an argument to prove that they differed. As my adversary, however, can make no use of this part of his authority, it is a pity that it should be cited for nothing: I will therefore use it as a strong corroborative proof of the argument I used to show the reason why, on certain navigable rivers in France, the alluvion belonged to the king, to wit: that the grants there were bounded by the road, not by the river. The concluding lines may also serve to strengthen my reasoning, and to prove the feudal origin of the local variations which the French have made from the imperial law.

The opinion on this point concludes "that the *existence* of a publick road or causeway, forms an exception in favour of which all opinions may be reconciled;" but the authority says no such thing: the authority says, that the exception is formed by the road or cause-way being the *boundary;* not by its *existence*—an hundred roads and as many cause-ways might *exist*, yet if they were not the boundaries of the land, the alluvion would belong to the owner of the original soil.

Yet this is a fair specimen of the reasoning by which the government of the United States is gratuitously invited to harrass individuals with suits, and snatch their only support from the widow and the orphan.*

* A large proportion of the batture was purchased by Mr. Delabigarre, and is now the property of his widow and infant children.

I might perhaps be excused from producing further authorities to show how untenable the ground is, on which the defendants have sheltered themselves under the French laws, even supposing them the guide of our decision. Take, however, in addition, the following respectable authorities :—

DENISART, *title* ALLUVION, *vol.* 1, *page* 74.—"1. L'ALLUVION est une accroisement qui se fait insensiblement, et peu-à-peu sur les rivages de la mer, des fleuves et des riéières par les terres que l'eau y apporte.

"2. Lorsque par *alluvion*, un héritage se trouve insensiblement accru, et plus étendu qu'il ne l'étoit, l'accroisement appartient au propriétaire, et celui dont l'héritage est diminue par cette voie, ne peut pas revendiquer ce qui s'en manque.

" Cette maxime qui est puisée dans le droit Romain, A LIEU DANS TOUTE LA FRANCE, excepté en *Franche-Comt.* On y dit communément au contraire, que la riviére du Doux *n'ote ni ne baille.* Ainsi *l'alluvion* n'est point dans le cours de cette rivière, un moyen d'acquérir. Voyez la remarque de Dumoulin.

" Il faut encore excepter la rivière de Feère, qui, suivant une coutume locale d'Auvergne, *n'ote ni ne baille*, c'est-à-dire, que *lorsqu' elle prend d'anciennes possessions par inondation ou autrement, petit-a petit, de-ca on de-la l'ean, il est permis a celui qui perd, de suivre sa possession et de la revendiquer.*

" 3. L'augmentation qui arrive dans un héritage par *alluvion*, est une seule et même chose avec l'héritage accru : [*fundus fundo accrescit, sicut portio portioni ;*] il en prend toutes les qualitées accidentelles de fief et de roture, de propre et d'acquêt ; il est sujet aux mêmes charges, fussentelles d'usufruit et de substitution.

" 4. Il n'en est pas de même d'un accroissement subit, occasionné par un débordement, ou par quelqu'autre cas fortuit : la portion de ce terrien pourroit en ce cas être réclamée par le propriétaire. Voyez le coutume de Bar.

" 5. La maxime est d'ailleurs afferme par l'arrét rendu au rapport de M. l'abbé de Vienne, en la quatrième chambre

des enquêtes, le 15 Avril 1744, entre le marquis de Bouzols et M. de Chamflour, conseiller en la cour des aides de Clemont, rapporté par Guyot, traité des fiefs, tom. 6, chapitre *des rivieres*, page 673, n. 10; [et par arrêt du Mercredi 22 Février 1769, rendu en la grande-chambre, conformément aux conclusions de M. Seguir, avocat-général, la même chose a été jugée. La sentence qui avoit ordonné une visite des lieux, a été infirmée; et il a été ordonné qui par enquête respective, il seroit vérifié si le changement du cours de l'eau, sur la rivages de la mer, avoit été subit ou insensible. Me. Lochard pladoit pour le chopitre de Lucon, et Me. Caillou pour le sieur de Champagné.]

" 6. Bourjon prétend que ce qui accroit par *alluvion* appartient au seigneur haut justicier; mais ni son opinion, ni l'avis des auteurs qu'il cité ne sont suivis dans l'usage. Voyez la contume de Normandie, art. 195, l'article 268 de celle d'Auverre, l'article 155 de celle de Sens, et celle de Metz tit. 12, art. 28.

" 7. Les attérissements formés subitement dans la mer ou dans les fleuves et riviéres navigables, apportiennent au roi par le seul droit de sa souverainté. Voyez la dêclaration du moi d'Avril 1683, et M. le Bret, de la souverainté, liv. 2. chapitre 16; et les edits des mois de Décembre 1693, et Février 1710, concernant les attérissemens, isles et islots. On trouve ce doux édits dans le receuil de Néron, tome 2."

RENUSSON TRAITE' DES PROPRES, *p.* 39.

" It often happens that an inheritance which is bounded by *a stream or navigable river*, is augmented or diminished by the stream which forsakes its ancient bed, and makes for itself another. This augmentation or diminution, is a profit or loss to him *who has the adjoining inheritance*. The increase is an accessory, which belongs of common right, to the proprietors of the soil which is contiguous to it." *Ins. lib.* 2, *de rerum div. &c. &c.*

" This increase can have no quality different from that of the principal inheritance, according to Argentée on the custom of Bretagne, and Dumoulin on the ancient custom of

Paris, who says *the increase of alluvion is acquired to us, in the same right by which the original soil belonged to us; nor is this increase considered as a new field, but as a part of the first.*

"But what shall we say of an island formed in a river, opposite to our soil, which is separate property. It would seem that an island being a thing separate from the inheritance which borders on the river, there would be no right of accession, and that the island ought not to be considered as of the same quality: nevertheless we may pronounce that IT IS OF THE SAME NATURE WITH THE INHERITANCE, *quia eodem jure alluviones accedit.* Common right requires that an island which arises in a river, should belong to the proprietor of the adjacent soil; or if it arises in the midst of a river, that it should belong in common to those who own the soil on the opposite sides, &c. 1 *Domat*, 268.

"The proprietor of an estate acquires the possession of whatever may be added to it by nature, which augments the land, and becomes as it were an accession thereto. Thus the insensible increase which may be gained by an estate joining to a river, by the operation of the water, is an acquisition gained by the proprietor of the estate.

"But if an inundation or the sudden change of the bed of the river, divides an inheritance, and joins it to another, the property of this part remains in its ancient owner."

.....

Ferriere's Commentaries on the Institutes, *Book* 2, *Title* 1.

TEXT.

§ 20. *De Alluvione*—"Moreover, whatever a *navigable river (fleuve)* adds by alluvion to our estate, is by the law of nature our own. By alluvion we mean an increase so imperceptible, that it is impossible to know how great an augmentation has been received at each instant of time."

FRENCH LAW.

"*The disposition of this section is observed among us.*"

TEXT.

§ 21—" But if by the impetuosity of its current, a river has carried off a part of your land, and joined it to that of your neighbour, this part does not cease to belong to you: however, if it has remained a long time joined to the inheritance of your neighbour, and the trees which it has carried with it have taken root, the soil shall belong to him."

FRENCH LAW.

" The provisions of this section take place in *France*, with this difference, nevertheless, that when the accessions which are thus *suddenly made*, are very considerable, and that they have remained joined to an inheritance for a long period of time without being claimed, it is said they ought to belong to the *kings*, or to the *superiour lords*, as a kind of *vacant possession*, or a derelict which appears conformable to the royal ordinances by which the *islands* and *atterissements* which are formed in great rivers belong to the king."

A most persuasive, if not a conclusive argument that the law of *France* is as I have stated, may be drawn from the following circumstances and opinions. When the first consul undertook the great task of giving a general system of jurisprudence to *France*, he caused his digest or *projet de code* to be prepared by the first lawyers in the country—this was printed, and a copy sent to every superiour tribunal in the republick for their consideration; and after a proper period it was returned with such remarks and amendments as had occurred to the different judges, that the legislature might, prior to its final adoption, have the benefit of the best legal advice on its different provisions.

The articles in this *projet* relating to the subject under discussion, are contained in the 2d sect. 2d title of the 2d book, and are as follows:

" 15.* The collection of earth (attérissements) and accessions which are annexed successively and imperceptibly to

* " Les attérissemens et accroissemens qui se forment succes-

the land bordering on a river or navigable stream, are called *alluvion*. Alluvion belongs to the riparious proprietor, when it takes place on a river, whether it be navigable or capable of carrying rafts or not—under the condition in the first case leaving the path prescribed by the regulations.

"16. The rule is the same with respect to the running water, which retires insensibly from one of its banks, and encroaches on the other; the proprietor of the shore which is left dry, shall benefit by the alluvion—and the proprietor of the opposite shore shall not be permitted to reclaim the land which he has lost."

If this part of the project had made any change in the ancient laws of the country, some of the learned men to whom it was submitted, would have taken notice of the novelty, with marks either of censure or approbation—but we find them all either passing over the articles as merely declaratory of the old law, or else expressly acknowledging them as such, and stigmatizing the doctrine now contended for by Mr. *Derbigny* as an oppressive and ineffectual attempt to pervert the laws of the kingdom.

To begin witn the tribunal of *Paris*, they set out with this general observation on the part of the code containing the provisions—"The rules proposed" (they say) "on the subject, are in general conformable to what has *always been practised*, and give occasion to but very few observations," and among those few are none on the subject of alluvion.

sivement et imperceptiblement aux fonds riverains d'une rivière, s'appellant *alluvion*.

"L'alluvion profite au propriétaire riverain, soit qu'il s'agisse d'un fleuve, ou d'une rivière navigable, flottable ou non; à la charge, dans le premier cas, de laisser le marche-pied prescrit par les réglemens.

"16. Il en est de même des relais que forme l'eau courante qui se retire insensiblement de l'une de ses rives en se portant sur l'autre; le proprietaire de la rive découverte profite de l'alluvion, sans que le riverain du coté opposé y puisse venir reclamer le terrain qu'il a perdu.

Ce droit n'a pas lieu à l'egard des relais de la mer

The tribunals of *Nanci*, *Nimes*, *Orleans*, *Rions*, *Liege*, *Metz*, *Montpelier*, *Agen*, *Aix*, *Grenoble*, *Poictiers*, *Rennes*, and others, pass over these provisions as matters of course, or recommend a slight alteration, to prevent disputes between the proprietors of lakes and the adjoining land.

The tribunal of *Rouen* has these strong expressions, speaking of the 19th article in the project of code, which declares islands in the middle of navigable rivers to belong to the nation, they say:

"The Roman law gave to the adjoining proprietors the islands which were formed in navigable rivers, a disposition which appears more equitable than this article of the code, and *more worthy of a great nation*, whose true interest is not to acquire property to the injury of individuals.

"The edicts and declarations of the former kings which claimed for the domain the islands of navigable rivers and *fleuves* (primary rivers) were only exchequer laws; these laws were founded on the false pretext that the inlands were an appendage of the river, which they considered as belonging to the king. But,

"1. The river itself is not a national domain, but a thing of which the publick have the use, it belongs to the nation, not in full property, but as an appendage of its sovereignty.

"2. The islands are not appendages to the waters of the river, but to the bed of the river: the right of individuals to which is acknowledged when the river abandons it.

"An island cannot be formed without increasing the width of the river at the expense of the adjoining land—and the damages to which the proprietors of these lands are exposed, should entitle them to the islands, as an indemnity for the risks and losses they incur.

"The principle which we propose would not at all invade the publick right to the islands, which the nation possesscs, or for which they have positive titles—but it would tranquillize those individuals, who FOR AGES have possessed islands in the rivers, as the true owners—and whom the agents of the

domain HAVE ALWAYS VEXED WITHOUT HAVING EVER SUCCEEDED IN DESPOILING THEM OF THEIR ESTATES."*

Here we have the positive declaration of a learned tribunal speaking to the collective legal wisdom of the nation, and in the performance of a solemn and disinterested office, deciding that the edicts did not extend to *alluvions*, but only to islands in navigable rivers.

That even in that stong case, the edicts were considered as EXCHEQUER LAWS, (lois bursales) founded on FALSE PRETEXTS, which were NEVER EXECUTED, served only for the purposes of VEXATION, and that the proprietors have IN SPITE OF THEM, kept possession of their islands FOR AGES.

The tribunal of Toulouse recommends the same provisions in favour of isles and islands—And that of Lyons expressly

* "La loi Romaine au digeste *de acquirendo rerum dominio*, attribuaient aux propriétaires voisins, les iles qui se formaient dans les fleuves—disposition qui parait plus equitable que cet article du code, et plus digne d'une grande nation, dont le veritable intérêt n'est point d'acquérir des propriétés nouvelles par preference aux particuliers.

"Les edits et déclarations des ci-devant rois qu'attribuaient au domaine les iles des fleuves et rivières navigables, n'etoient que des loix bursales. Ces lois se fondaient sur le faux prétexte que ces iles étaient un accessoire du fleuve qu'on regardoit comme appartenant au roi.

"1. Le fleuve lui même n'est point un domaine national, mais une chose publique; il appartient à la nation non a titre de propriété, mais à titre de souverainete.

2. L'ile n'est pas un accession des eaux du fleuve, mais bien du lit du fleuve, sur le quel les droits des particuliers ne sont pas me connus lorque le fleuve l'abandonne.

3. Il ne peut guère se former une ile sans que le fleuve s'olargesse aux Dépens des terrain voisins; et le ravage aux quels sont exposés les propriétaires des ce terrains, doivent leur faire obtenir les iles qui se forment dans le fleuve, comme une juste indemnité des risque q'uils courent et des pertes qu'ils épronvent.

Le principe que nous proposons ne porteroit aucune atteinte à la propriete dominiale des iles que la nation possede ou sur les quelles elle à des titres d'engagement; mais il servirait à tranquilliser les particuliers qui depuis des siécles possedent des iles dans les fleuves comme veritables propriétaires, et que les agents du domaine ont toujours vexés, sans pourtant parvenir à les dépoullier de leur fonds.—*Observations du tribunal d'Appel de Rouen, p.* 15.

declares that the claims of the crown to the "*Islands in navigable Rivers*," never considering the edicts as even claiming alluvions, was founded on no other law than that of force, (le droit du plus fort.)

Portalis, in his preliminary discourse to this part of the Code, repeats the same ideas; asserts that the language of the Code on the subject of alluvion, is that of the ancient law, as SETTLED LONG PRIOR TO THE REVOLUTION; refers the claims of the crown to obsolete feudal principles, and finally declares that the edicts were only fiscal attempts to oppress the subject.

.....

I should not have multiplied these authorities, had it not have been for the respect I bear to that of *Pothier*. None of those I have cited, at all accord with the doctrine the defendants suppose him to maintain. Many of them are posterior to his work, and of those none mention his opinion as differing from their own. This notice his acknowledged respectability would have required, had they thought this difference existed. I think, therefore, I may fairly infer from their silence, that they have construed the passage cited in the way that I have done: of course that there is a perfect coincidence between these eminent writers on this point, and that the laws of France, except in the particular enumerated districts, is conformable to the Roman and the Spanish codes.

But as I am determined not to leave my adversaries a single recess in which they can hide a doubt, or from which they can bring out an argument, I will suppose that I have wholly failed in this division of my cause; that the laws of *France* are to govern, and that they are as laid down by the defendants; yet the alluvions of the *Mississippi* have not since the first settlement, belonged to the crown of *France*.

FIRST. Because, as I have shown, we hold the lands in *franc aleu* or allodial tenure.

SECOND. Because if the king of *France* had this right, he

has expressly *renounced it*, and the authority in *Pothier*, as well as the edicts, admit that a grant of alluvion shall be good against the crown.

In *September*, 1712, *Louisiana* was first granted, by the crown, to Mr. *Crozat*. I have never seen a copy of this grant, but there is reason to believe from a subsequent recital, that it was extremely liberal. This however is immaterial, for having surrendered his grant, the same country was conceded to the West-India company, by letters patent, dated in *August*, 1717, the Vth article whereof is in the following words : " In order to provide the said West-India company with the means of making a permanent establishment, and to execute all the plans they may form, we have given, granted and conceded, and by these presents do give, grant and concede to them, forever, all the lands, coasts, ports, havens and islands which form our province of *Louisiana*, as well, and with the same extent as we had granted it to Mr. *Crozat*, by our letters patent, dated 14th *September*, 1712, to enjoy the same in full property, *lordship and justice*, *reserving to ourselves*, *but only fealty and homage*, which the said company shall render to us and the kings our successors, with a crown of gold of the weight of twenty marks."

By the 8th article the company are expressly authorized to grant lands in *franc aleu* or allodial tenure.

Under this ample grant, all the titles of the *Jesuits* were derived,* and after reading it, I fancy nothing more will be said of the *royal right* to the alluvions of the *Mississippi*, under the West-India company.

Again, by the fifteenth article of the charter, the custom of *Paris* is expressly introduced and established *unchangeably* as the fundamental law of the territory. Whatever then may the laws of the other part of the *French* dominions be, unless alluvions can be shown to be the property of the crown by the *Custom of Paris*, the argument with respect to

* The title to the Jesuits is dated in 1726 near six years before the patent to the company was resumed by the crown.

this property is at an end. This has not been attempted; for it was known that it could not have been done with success. As however, I have not the same reasons to shrink from this research, I will refer to *Ferriere's* folio edition of the custom of *Paris*, and its commentary, 4 vol. p. 917, nos. 37, 38, 32. "Alluvion is an imperceptible increase to an inheritance, produced insensibly diminishing the neighboring lands; for the augmentation cannot otherwise take place. This increase is so intimately united to the inheritance, that it assumes all its qualities, and consequently becomes separate property, if the inheritance were so. According to Demoulin, on the first article of this custom, gloss. 5, nos. 115, 116, where he says, *incrementum alluvionis nobis adquiretur, eo jure quo ager augmentatus primum ad nos pertinebat, nec illud incrementum sentitur novus ager sed pars primi.*

"It would not be the same case, if the river should add to the inheritance of an individual, an island or an entire parcel of soil, although it should be united to the inheritance, THIS WOULD BE CONSIDERED AS A PART OF THIS INHERITANCE; but not with the quality of separate property." See also the same work, vol. 1, p. 886.

These authorities prove much more than is necessary for my purpose, not only that alluvions strictly so called, which are made imperceptibly, belong to the proprietor of the soil to which it is attached; but that the *Custom of Paris*, in conformity with the *Roman* and the *Spanish* laws, give to him the islands and portions of land formed in a river or on its banks, by a change of its course, or other sudden accident.

But the custom of *Paris*, as I have shown, was declared by the charter, and I might have added by an express edict of "Louis the fourteenth," to be the law of this colony.

So that I think I have fully demonstrated that even if the general law of *France* would have given this kind of property to the king, yet on the *Mississippi*, it belonged to the adjoining proprietor, as well by the laws of the province as by the actual grant of the king.

Before I conclude I ought perhaps to make some observations on the relinquishment, alleged to have been made by

Mr. *Gravier*, of his title, and the notorious acts of ownership which are stated to have been done by the *Spanish* government. Let it be remembered that proof of these very acts was produced by the corporation of the city as evidence of *their Title* and that it has not been until after they despair of making any title in themselves, that they now appropriate the same evidence to make out one for the United States.—What reliance can the United States have on such accommodating proof, that will fit any claim and serve any occasion? That first used to establish the interests of the corporation is now set to work as the engine of their malice and resentment. But it is not from its general character that I would stigmatize it. Let us do justice and examine it fairly.—What are these proofs?

1. *Gravier* abandoned his right to the publick.
2. Governor *Carondelet* ordered the sheds on the batture to be pulled down.
3. The cabildo refused permission to erect any buildings thereon.
4. The inhabitants of the town dug earth there, and the publick used the batture as a landing.
5. The auditor gave it as his opinion that the ground between high and low water mark belonged to the publick.

1. *Gravier* abandoned the batture to the publick.

A point materially relied on both in the case and in Mr. Derbigny's opinion, to show this relinquishment of *Gravier* is, that by depositing a plan, in which this part of his farm was not laid out into lots, he had virtually declared that it was a common for the publick—the case indeed goes further, and says that in this plan the batture *was marked as a space which is to remain free and not subject to be built on.* This in the literal acceptation of the terms is UNTRUE, for there is *no such mark* on the plan, and therefore I presume Mr. *Moreau*, who drew the case, meant that it should be understood with the qualification that follows, that it was marked as free only because it was not divided into lots, that is to say, because it was *not marked at all.* The same wise reasoning would vest all

the rear as well as the front part of *Gravier's* farm in the publick, because the line of lots occupied but a small part of the farm fronting on the road. But it is said Mr. *Gravier* declared that he had abandoned his right to the publick—If the evidence of these declarations had been as full as certain and circumstantial as it is contradictory, vague, and frivolous, yet without writing and recording it would give no title to the *United States*, according to the laws of the country at the time it was said to have been made, [see the discussion of this point in the report of the case.] But the proof itself is wholly uncertain—one witness says it was to *the publick*, another to the inhabitants of the town, and a third to those of the suburb—none of them pretend to relate with precision the time, conditions or consideration of the supposed abandonment. But can it possibly escape the attention of the most superficial reasoner, that this branch of the argument is directly at war with all the others, and that the very allegation of it is an express admission of our title? The same may be said of the *Baron de Carondelet's* and governor *Gayosa's* orders to repair the roads by the publick convicts—for it was in both instances said to be founded on this supposed abandonment, of which both the governors know so little that they always considered *Gravier* as the owner of the land, and sent the order for repairs in the first place to him. These very facts too stated and relied on by those who advocate the title of the *United States*—completely contradict the unblushing assertion that "*the batture never ceased to be part of the sovereign's domain.*" If this was the case, why did *Carondelet* and *Gayosa* both send to *Gravier* to repair the roads, and why according to Mr. *Derbigny's* showing, did they undertake the task only when informed that *Gravier* had abandoned his right.

2, 3, 4, and 5. Governor *Carondelet* ordered the sheds built on the batture to be pulled down—The cabildo refused permission to build others—the auditor gave it as his opinion that the publick had a right to the land, and they actually used it for a publick landing.

There is proof that the demolition of the buildings arose from their being in the range of the fort guns. *See the deposition of Mr. Pedesclaux*—but admitting these facts to be proved in the fullest manner, no other inference can be drawn from them, than one incident to the nature of the property.—By the civil law, the publick have a right to the use of the banks of navigable rivers, though the property remains in the owner of the adjacent soil; on the *Mississippi*, by usage and the nature of the ground, the bank comprehended the levee, and all the space between it and the river. When the river encroaches, the levee is brought nearer in; when it retires, or forms an alluvion, the proprietor extends his levee, encloses the new made ground, and leaves the publick the enjoyment of the new bank and that part lying outside of it, for the purposes of navigation—On this space it is unlawful for the proprietor to erect any thing that may interfere with the use secured to the publick.—The governor therefore would have had a right to order the sheds to be demolished, because they must have interfered with the publick use—The cabildo, who were the governor's council, were right in refusing permission to erect any buildings—the auditor was perfectly correct in the opinion he is said to have given, and the publick had a right to the free use of the property for the purposes of navigation. They were all right *then*, because *Gravier* had not enclosed the alluvion land, and by making a new levee and tow path on the bank of the new made ground, given the publick the accommodation the law required—But they would have been perfectly wrong if *Gravier* had at that time offered as the proprietors do now, to reclaim the land from the inundation of the river, and by erecting a tow path, a levee, and commodious wharves, give the publick ten-fold the convenience to which they were entitled by law. Thus we see, that all the material facts proved by the advocates for the title of the *United States*, confirm and strengthen that which I assert to be in *Gravier* and those who claim under him, and I may, without flattering myself, believe that I have fully established the following points:

I. That the *Jesuits'* plantation was like all the others on the river, bounded in front by the river itself.

II. That no alteration took place in the front boundary of any of the subdivisions of that plantation by the sales of 1763.

III. That the alluvion formed in front of that plantation, belongs to the proprietors of the several subdivisions:

1. By the general law of *France*.
2. By that of *Spain*.
3. By the particular laws of this province while under the *French* government.
4. By virtue of the allodial tenure by which they were held.

IV. That the alleged relinquishment by *Gravier*, is too uncertain to give title: and if proved, only serves to destroy the other arguments used by the advocates of the *United States*.

V. That the acts relied on as possessory by the government, are perfectly consistent with my title, and rather serve to strengthen than destroy it.

The view I proposed to take of the arguments urged in favour of the claim of the *United States* to this property is now finished. Let it be read with attention. Let those whose duty or inclination calls them to decide on these pretensions, examine carefully the principles and study the authorities cited to show that this was never of right a part of the sovereign's demesne. Let this be done without prejudice or partiality, and though all my prospects of fortune are involved in the decision, I shall await it without anxiety. I have hesitated long before I resolved on its publication; but the unwearied pains which are daily taken to slander my title, and render my property useless, require that I should take some steps to counteract them.

This must be my apology for discussing a legal question before the publick.

EDWARD LIVINGSTON.

December 10, 1807.

NOTES.

NOTE A.

L'AN mil sept cent soixante trois, le jour du mois de Juillet, huit heures du matin, en vertu d l'arrêt du conseil supérieure de la province de la Louisiane, en date du neuf du présent mois, rendu sur la requête de Monsieur La Fréniere procureur général du roi, portant et ordonnant que tois les biens meubles et immeubles appartenant aux ci-devant soi-disant Jesuites, seront judiciarement vendus pardevant Monsieur Foucault, contrôleur de la marine et second juge au conseil supérieure de cette province, commissaire nommée en cette partie, et en présence de mon dit sieur le procureur général du roi, pour les neniers en provenants être mis sous la main du roi. En conséquence de quoi, nous Denis Nicolas Foucault, contrôler de la marine et second juge au conseil supérieure de la province de la Louisiane, commissaire nommé en cette partie, en présence de Monsieur le procureur général du roi, et acccompagné du greffier et de l'huissier dudit conseil, nous sommes transportés à la barre de la cour à l'effet de procéder pour le première fois à recevoir les criés et enchères pour parvenir à la vente et adjudication au plus offrant et dernier enchérisseur, d'une terre et habitation située près de cette ville, appartenante aux ci-devant soi-disant Jésuites, où étant, vû le procès-verbal des publications et affiches publiées et apposées en conséquence dans tous les lieux et endroits ordinaires et accoutumés de cette ville de la Nouvelle-Orleans, par Marin Lenormand, huissier, en date de dix-sept dudit présent mois, et s'y étant trouvé nombre d'enchérisseurs, nous avons fait publier et proclamer à haute et intelligible voix par l'huissier crieur que l'on allait tout présentement procéder pour la première fois à recevoir les criées et enchères pour parvenir à la vente et adjudication au plus offrent et dernier enchérisseur d'une terre et habitation No. 1er. *ayant sept arpents de face* joignant aux fortifications de cette ville, courante de soixante neuf dégrés du nord à l'ouest, la limite au-dessus des dits sept arpents, courant soixante-quatre dégrés quarante huit minutes trente-neuf secondes, vingt-deux toises et demie du nord à l'ouest, sur cinquante arpents de profounder, ensemble avec tous les bâtimens qui sont dessus, consistant en deux maisons principales, cuisine, magazins colombiers, briqueterie, indigoterie, cabanes à nègres et clôtures, circonstances et dependances, sans en rien reserver ni retenir, tel que le tout se consiste et comporte, attenant d'un coté à cette ville et de l'autre à la terre No. 2, faisant partie de la terre appartenante aux-dits soidisant Jésuites ; aux clauses et conditions par l'adjudicataire de payer le prix de son

adjudication dans huit mois du jour d'icelle, en donnant bonne et suffisante caution, et de payer comptant tous les frais faits pour parvenir à la dite adjudication, entres les mains du greffier avant d'être mis en possession ; et après avoir attendu jusqu' à dix heures sonnées sans que personne se soit présenté pour faire son dite enchère, nous commissaire sous dit et soussigné, du consentement de mon dit sieur procureur général du roi, avons ordonnés et ordonnons que nouvelles affichesseront publiés et apposées dans tous les lieux et endroits ordinaires et accoutumés de cette ville, le Dimanche, trente un du présent mois, pour en venir à des nouvelles criées et enchères le Mercredi suivant, troisième du mois d'Aôut prochaine, huit heures du matin ; auquel jour toutes personnes seront reçues à y faire leurs enchères au susdites clauses et conditions et ont signés le susdits jour et an.

(Signé) LA FRENIERE.
FOUCAULT.

Certifié conforme à la minute, folio 221 d'une liasse intitulée *Proces des Jesuites*, et déposé en ce moment au greffe du conseil de ville.

Nlle.-Orléans le 10 Octobre, 1807.

Mce. BOURGEOIS, *Sec.-Greffier.*

.....

In the year 1763, the day of the month of July, at eight in the morning, by virtue of a decree of the Superiour Council of the Province of Louisiana, dated the ninth of the present month, pronounced at the instance of Mr. La Freniere, Procureur General of the King, declaring and ordering that *all the estate real and personal, of the persons heretofore stiling themselves Jesuits, should be Judicially sold* before Mr. Foucalt, Comptroller of the Marine and Second Judge of the Superiour Council of this Province, Commissioner named in this respect, and also in the presence of the said Procureur General, in order that the proceeds may be placed at the disposition of the king.— In consequence whereof we, Dennis Nicholas Foucault, comptroller, &c. in the presence of, &c. and accompanied by, &c. went to the bar of the court, for the purpose of proceeding, for the first time, to the sale at auction of a parcel of land and plantation, situated near this city, heretofore belonging to the said persons calling themselves Jesuits, where being arrived, and having seen the advertisements, &c. we caused to be published and proclaimed with a loud and intelligible voice, by the cryer, that we were about to proceed, for the first time, to receive the bids and offers, in order to make sale, to the highest bidders, of a tract of land and plantation, No. 1, having seven acres in front, adjoining the fortifications of this city, running sixty-nine degrees from the north to the west, the upper line running north sixty-

four degrees forty minutes and thirty-nine seconds west, by fifty acres in depth, together with all the buildings which are thereon, consisting of two principal houses, a kitchen, store, pigeon-house, brick-kiln, indigo-works, negro huts and enclosures, *with all its circumstances and dependencies, without reserving or retaining any part thereof of whatever parts the whole may be composed, and as it now is*, [tel que le tout se consiste et comporte] bounded on one side by the city and on the other by the lot No. 2, being a part of the estate belonging to the persons calling themselves Jesuits, &c.

.....

TRANSLATION.

PROCEEDING OF SALE OF THE JESUITS.

In the year 1763, on the 14th day of July in the same year, we, the undersigned councillor of the king, inspector of the roads, and surveyor general of the province of Louisiana, do declare to all whom it may concern, that by virtue of the orders of Mr. Dabbadie, commissary general of the navy, Ordonnateur of the said province, rendered the thirteenth of the present month, by which we were directed to transport ourselves on the habitation of the persons entitling themselves Jesuits, situated above and bordering on the *glacis* of the fortifications of the city of New-Orleans, there to examine the titles and papers relative to the possessions of the aforesaid persons and to survey the lands, which we found ought to contain thirty-two *arpents* of front on the river, "*de face sur la fleuve St. Louis*," according to the said titles, papers, plans and minutes, "*proces verbeaux*" of survey, herein after mentioned, made by the late Mr. Broutin, the former engineer, then charged with the surveys of the colony. To wit, twenty arpents of front, measured on the perpendicular of fifty-four degrees from north to west, running to the depth of fifty arpents, which shall, however, be reduced to forty arpents in case it should anticipate on the lands not yet conceded or to be conceded—which lands M. de Bienville, the former commandant and governor of the said province, has sold on those conditions and in allodium, [*franc aleu*] to the persons calling themselves Jesuits, by an act passed on the 11th April, 1726, in the presence of Andrè Chavre, notary, *au Chatelet de Paris*.

Also, five arpents in front, "*en face*" measured on a straight and oblique line, running along the said river, and above and bordering on the twenty mentioned above, sold to them with the same depth, with the same rights and privileges as the preceding, by the late Mr. de Noyau, lieutenant in the service of the king, attorney in fact for the said Mr. de Bienville, by a private act, dated January the 22d, 1728.

Also, seven arpents of front, seven arpents measured, as adjoining, and above, the five preceding arpents and with the same depth, which the said Jesuits had purchased from Mr. Breton, comptroller of the navy, and first councillor of the superiour council of this province, by an act passed on the of December, 1743, forming together with the preceding acquisition the totality of thirty-two arpents of front, mentioned by the said Broutin, in the proces verbal of the 30th December, 1728, of the 19th January, 1736, and of the 18th and 23d Dec. 1745.

Conformably to the different operations delineated on the plan made by him on the 19th of June, 1736, and the 23d December, 1745, &c.

P : 148—" In the year one thousand seven hundred and sixty-three, the 24th November last, we, councillor of the king, inspector of roads, and surveyor of the province of Louisiana, do declare, that in virtue of orders given by the commander general of the said province, we went with Mr. Pigeor, L. L. on the lands which had belonged to the Jesuits, situated above and bordering on the fortifications—for the purpose, at the request of Mr. La Tussiere, to divide the thirty-two arpents of land mentioned in our proces verbal of the 22d of July last, the judicial sale of which took place on the following, at the greffe of this city, to wit:

" Seven arpents of front on fifty of depth for the first lot, bordering on the glacis of the said fortification, adjudged the aforesaid day to Mr. Pradel, lieutenant in the navy, commanding the king's ship La Solomon, then in this harbour.

" 2. Five arpents of front, with the same depth, for the second lot, situated above the first, and bordering on the same, adjudged the same day to Mr. Larrivèe, merchant.

" Five arpents of front, with the same depth, for the third lot above, and bordering the second, adjudged the same day to Mr. Grenier, merchant.

" Five arpents in front, by the same depth, for the fourth lot, adjoining to and above the third, adjudged the same day to Mr. Bonrepos, an ancient officer of infantry.

" Five arpents in front, on the same depth, for the fifth lot, adjoining to and above the fourth, adjudged to Mr. Sollet, citizen of this town.

" Five arpents in front, by the same depth, for the sixth and last lot, adjoining to and above the fifth, adjudged to Messrs. Durand, Brothers, merchants. All purchasers summoned to be present, at the operation of surveying, distribution and delivery of the said parcels of land—At which they were all present either in person or by their attornies, viz. Mr. Amlet, knight of St. Louis, engineer in chief of the king, acting for Mr. Pradel the son, purchaser of the second lot, late belonging to Mr. Larrivèe, after the said adjudication, as appears by the act passed between

them dated the Mr. Lamotte, acting for Mr. Grinier, absent."

[Then follows the proces verbal of the placing of the posts to show the direction of the literal line next the city, and the record then proceeds.]

"On which line, and at the point D. we have, on the 28th of the present month, replaced our instrument six toises above the said point A, *to ascertain with precision the extent of front of those lands on the river St. Louis*, the distribution of which at right angles could not take place, according to the dispositions of the first plan, which circumstance compelled us to make new ones, still relative, however, to those mentioned in our proces verbal of the 22d July last, by two straight lines running along the river, the first of which DE, formed an angle of 111 degrees with that of the said boundary of sixty degrees."

The record then sets forth the geometrical operations for dividing the six several lots, and that after having measured off the first and second lots, which then both belonged to Mr. Pradel, "*they opened an angle of* 117 *deg. with the said line of conduct*" (ligne de conduite) to direct the limits between this habitation (now that of Gravier) and No. 3."

After describing minutely the operation of division, it concludes thus, "And as there remains on the upper end of the land late belonging to the Jesuits, according to the plan of our operations, a tongue of land forming the figure of an isoseles triangle, comprehended between the line of boundary GLL. and the dotted line G. K. it shall remain between these limits to be used as need may require hereafter.

"In testimony whereof we have agreed to and signed the present proces verbal with the said sr. Pigeon, and the said purchasers or their attorneys afore named in the former part of this record, to have the proper effect, and serve as a field book [papier terrier] annexed to the plan of survey, and of the distribution of the said land into the six lots above mentioned. Done at New-Orleans, the 22d of the month of December, in the year 1763.

"Signed,

"*Olivier Devezin, Pijon, Thos. Saulet, Le Chevr. De Beanrepos, Amelot, Villars, A. Faures, J. Lamothe, Durand Freres.*"

"I require in the name of the king, that the present proces verbal should be homologated; that it may have its full and entire effect; that the decree which may be pronounced may serve as letters of possession irrevocable and incontestible to the purchasers of the six lots of the land belonging to the former company of Jesuits. New-Orleans, 24th April, 1764.

"*Signed* LA FRENIERE."

"*The Superiour Council* of the province of Louisiana having seen the proces verbal of the division of the lands of the ci-devant

company calling themselves Jesuits, made out by Mr. Oliver Devezin, and the conclusions of the procureur general of the king, the council hath ordered, and hereby doth order, that the said proces verbal shall be executed according to its form and tenor, and shall remain homologated as is above stated.

" Signed,

" *D'Abbadie, Zuchel, De Kernion Aubry, Faucault, Marrenel, Murhuise, and De Amney.*"

NOTE B.

MONSIEUR,

ETANT de la dernier conséquence que la levée de vos terres soit dans le mellieur état, vous prendres des mésures avec Monsieur de la Barre, régidor perpétualle, alguazil mayor, pour récommoder la dite levée, à commencer de l'endroit où mon dit Sr. de la Barre vous indiquera.

Votre exactitude reconnú ne me laisse pas la moindre doute du zèle avec lequel vous remplirez cette ordre.

Je suis, Monsieur,

Votre serviteur,

LE BARON DE CARONDELET.

Nlle.-Orléans, 10 Mars, 1794.

A Mons. Gravier.

.....

TRANSLATION.

SIR,

IT being of the greatest consequence that the levee of your land should be in the best condition, you will please to take measures with M. de la Barre, perpetual register and alguazil mayor, to repair the said levee, beginning at the place which the said Mr. de la Barre will point out to you.

Your known punctuality leaves me no doubt of the zeal with which you will obey this order.

I am, sir, your servant,

THE BARON DE CARONDELET.

New-Orleans, 10th March, 1794.

To Mr. Gravier.

NOTE C.

Adjudication de six arpents de terre appartenante aux ci-devant soi-disant J suites.

A dix heures du matin.

L'AN mil sept cent soixante trois, le quatrieme jour du mois d'Aôut, dix heures du matin, en vertu de l'arrêt du conseil supérieur de la province de la Louisiane, en date de neuf Juillet dernier, reudu sur la requête de M. La Frenière, procureur général du roi, portant et ordonnant que tous les biens, meubles et immeubles, appartenant aux ci-devant soi-disant Jésuites, seront judiciarement vendus par devant Monsieur Foucault, contrôleur de la marine, et second juge au conseil supérieur de cette province, commissaire nommé en cette partie, et en présence de mon dit sieur le procureur général du roi, pour les deniers en provenante être mis sous la mains du roi: en conséquence de quoi, nous Denis Nicolas Foucault, contrôleur de la marine et second juge au conseil supérieure de la province de la Louisiane, commissaire nommé en cette partie, en presence de M. le procureur général du roi, et avec le greffier et l'huissier du dit conseil, nous sommes transportés à la barre de la cour, à l'effet de procéder pour la premier fois à recevoir les criées et enchères pour parvenir à la vente et adjudication au plus offrant et dernier enchérisseur, d'une terre situé de l'autre bord du fleuve, en remontant, distant de cette ville d'une lieue et demie, appartenante aux dits ci-devant soi-disant Jésuites, où ètant, vû le procès verbal des publications et affiches publiées et apposées en conséquence dans tous les lieus et endroits ordinaires et accoutumés de cette ville de la Nouvelle-Orléans, par Marin Lenormand, huissier, en date du vingt-quatre Juillet dernier, et s'y étant trouvé nombre d'enchérisseurs, nous avons faite publier et proclamer à haute et intelligible voix, par l'huissier crieur, que l'on allait tout présentement procéder pour la premier fois à recevoir les criées et enchères pour parvenir à la vente et adjudication au plus offrant et dernier enchérisseur, d'une terre ayant six arpents du terre de face sur la profondeur ordinaire de quarante arpents, la limite courant au nord et sud pliens, située à une lieue et demie de cette ville, d'lautre bord du fleuve, en remontant, circonstances et dépendances, sans en rien reserver ni retenir de fond en comble, tel et ainsi que toute sa poursuite et comporte, attenante d'un côté à l'habitation de la dame veuve Dauphin, et de l'autre côté attenante à une pareille terre appartenante aux dits ci-devant Jésuites, où toute personnes seront reçues à y enchérir aux clauses et conditions par l'adjudicataire, de payer le prix de son adjudication dans huit mois du jour d'icelle, en donnant bonne et suffisante caution, et de payer comptant tous les frais faits pour parvenir à la dite adjudication, entre les mains du greffier avant d'être mis en possession. Et après avoir attendu

jusqu'à midi sonné, sans que personne se soit présenté pour faire leur dite enchère, nous commissaire sous dit et soussigné, du consentement de mon dit sieur le procureur général du roi, avons ordonné et ordonnons que nouvelles affiches seront publiées et apposées dans tous les lieux ordinaires et accoutumés de cette ville, le Dimanche quatorzième présent mois d'Août, pour en venir au Vendredi dix-neuf dudit mois à dix heures du matin, au quel jour il sera procédé à la deuxième criée et en chère, et où toute personnes seront reçues à y faire leurs dites enchères aux susdites clauses et conditions ; et ont signé les jour, mois et an que dessus.

(Signé) LA FRENIERE.
FOUCAULT.

Certifie conforme à la minutes, folio 213, d'une liasse intitulée *Proces des Jesuites*, et déposée en ce moment au greffe du conseil de ville.

Nlle.-Orléans, le 10 Octobre, 1807.

Mce. BOURGEOISE, *Sec.-Greffier.*

.....

NOTE D.

Je soussigné, arpenteur député pour le comté d'Orléans, certifie n'avoir jamais vû aucune concession depuis plusieurs années que j'exerce dans le comté, aucune concession dis-je, soit Francaise ou Espagnole, située sur le fleuve, qui ne fut bornée par le fleuve, et que toutes ces concessions disent pour exprimer leur étendue " tant *d'arpens de face*," ou " tant *d'arpens de face au fleuve*, et tant de profondeur ;" que la manière de mésurer cette etendue se fait en tirant une parallelle au fleuve, (autant qu'il est possible) ou par une perpendiculaire à l'un des côtés, mais que cette ligne ne designe jamais la limite de la face des habitations ; que les bornes que l'on plantê ne sont jamais au commencement de la ligne de côté que pour désigner la direction que doit avoir cette ligne ou l'air de vent qu'elle doit courir et que jamais on n'a planté des bornes pour marquer la ligne de face. En foi de quoi j'ai delivré le présent certificat.

Nlle.-Orléans, le 10 Décembre, 1807.

LAFON, *Arp. D p.*

.....

I, the subscriber, deputy surveyor of the United States for the county of Orleans, certify that during many years that I have pursued my profession in this country, I have never seen any concession or grant, either French or Spanish, of any lands on the

Mississippi, which was not bounded by the river itself; and that all those concessions or grants, to designate such boundary, use these expressions, "*so many acres in front*," [de face] or "*so many acres of front to the river*," [face au fleuve] by so many in depth; that the manner of measuring this extent is done by drawing a parallel as nearly as possible to the river, or by a perpendicular one of the sides, but that this line never designates the front limit of the plantation; that the land marks which are placed in the beginnings of the said lines are intended only to show the directions which those lines ought to have—but that boundaries are never placed to mark the extent of the land towards the river. In witness whereof I have given this certificate. New Orleans, 12th December, 1807.

(Signed) LAFON, *Dep. Sur.*

.....

Nous soussigné, ci-devant capne. grade. des armés, arpenteur royal et particulier de la province de la Louisine pour S. M. Cath. certifions et declarons, que pendant vingt huit années que nous avons exercé l'emploi d'arpenteur génl. de cette province, qu'il a toujours été en notre connaissance, que les concessions des terres sur les rives du Mississippi, *prennent leurs faces sur le bord du fleuve meme*, et ou viednent batture les eaux lorsqu'elles sont dans leurs plus grande croissance. Quant aux bornes fixées pour limiter les terreins, *n'etant uniquement destinees qu' a marquer la direction des limits ou airs de vent*, elles ont toujours été plantées à une distance arbitraire, pourvu neanmoins que la voie public qui doit regner sur les rives du Mississippi ne fût point obstruée.

En foi de quoi, j'ai delivre la présente, a la Nll.-Orléans.

CHARLES TRUDEAU.

Le 17 Mars, 1808.

.....

TRANSLATION.

I, the subscriber, heretofore captain by brevet in the royal army, royal surveyor for the province of Louisiana for his Catholick Majesty, do certify and declare, that during twenty-eight years that I have performed the functions of surveyor general of this province, it has always been in my knowledge, that the concessions of lands on the borders of the Mississippi, *have their fronts on the edge of the river itself*, and when its waters are at their greatest height. As to the boundaries placed to limit the lots, *being only destined to mark the direction of the limits, or*

the point of the compass, they have always been placed at an arbitrary distance, taking care that the publick road which ought to go along the bank of the Mississippi, should not be obstructed thereby.

In testimony whereof I have delivered these presents, at New Orleans, 17th March, 1808.

(Signed) CHARLES TRUDEAU.

.....

NOTE E.

TESTIMONY OF LAVEAU TRUDEAU,

Recorder of the City of New Orleans, and formerly Surveyor General of the Province.

THAT governor Bienville ceded to the Jesuits the property now in controversy, upon a perpetual rent—that after the confiscation of the property of the Jesuits, by the king, the lands were divided into smaller divisions, and two lots were sold by the officers of government to Madame Pradel, two to Mr. Duplessis, and the sixth to Mr. Durand—has seen the plan of the ground, with the divisions, made by Mr. Olivier, surveyor general at that time, which were delivered to him at the time of the conquest of the Spaniards—that he believes all the surveys and plans were destroyed by the fire which took place in 1788—has never seen the concessions to the Jesuits, but has seen the original plan of the grant—*That since his earliest recollection the road ran as it now does, as far as Madame Delor's—is now seventy-three years of age, and is a native of this country*—that the concessions or grants at that time were always *face au fleuve*—that since the purchase of Madame Pradel and of Bertrand Gravier, he stated to him that he had fifty acres in depth—that he remembers that at the time of the sale of the Jesuit's property, vessels came to the levee opposite to Madame Delor's—that there was then no batture from thence to the city—speaks of some time in 1762 or 1763—that the concession to the Jesuits, he believes was *like all the others, that is, from the river at its greatest height, according to the instructions given to the surveyors*—Knows the plan produced signed by him the 1st April 1788—the first sketch or draft which he made at the request of Bertrand Gravier—the Fauxbourg has since been extended by Bertrand Gravier in depth—that the lots in front marked as sold, and the square since added are in the hand writing of Bertrand Gravier—that a batture then existed and was considerable in the upper part of the Fauxbourg—that he measured it at that time at the upper end, and laid it down accordingly, but that towards town he laid it down accord-

ing to his judgment—that at the extremity of the line marked on the map he came to the water—the descent was toward the river and gradual—the batture was formed as all others are, by the natural deposit of the river—in high waters it was covered to the levee—that surveys were always regulated according to his instructions, by which he understood the royal road or publick highway—the batture he always considered as an alluvion, and although it did not form any part of the depth, yet he always considered it as much the property of the proprietor as the rest. That he knows also the plan produced being the second one, which he made immediately after the other, which was nearly a sketch, with the additions made by Bertrand Gravier—that he made it by order of Bertrand Gravier—has frequently spoken to Bertrand Gravier on the subject of the alluvion, and particularly at the time of making the last plan—always answered that by selling the front lots he considered himself as freed from the expense of the road and levee, and that he had no right to sell the alluvion—that he, the witness, always thought differently. That there were many disputes about the reparations of the levee, in the time of the Baron de Carondelet—that he recollects three facts—that Mr. Poeyfarré was put in possession of a lot marked No. 7, on the last plan, marked No. 2. with initials—that he discovered that he had advanced 28 feet, nearly up to the road, when he told Poeyfarré that Gravier would take as much in the rear—that Poeyfarré told him that Gravier had abandoned the batture [*devanture*] to him, and afterwards seeing Gravier, he said it was true, and if he wished it he would go to the publick office—that the witness understood by devanture, not only the space between the lot and the road, but the whole extension of the batture in front. That his mother-in-law had purchased the lots numbered 28, 29, and 30, at the corner of the street now called Girod—that a small angle being left between her lots and the street Girod, the witness applied to Mr. Gravier for its purchase, and at the same time requested that he would sell Madame Trudeau the devanture opposite those lots, to which Bertrand replied that he would not sell it, as he had abandoned it *to the proprietors of the lots fronting the river*.—Being called upon to establish the lines of the lots No. 66 and 69, on the borders of Mr. Faucher's land—Mr. P. Fauchet also solicited B. Gravier to sell the batture in front, when Gravier answered that he would not sell, as he had abandoned it, but he would permit Fauchet to enjoy it—Witness told Gravier that he thought he had a right to sell that property, to which he answered that he would have nothing to do with it, that he, however, might measure it off for Mr. Fauchet—That when Mr. Gravier answered that he had abandoned it, his impression was that it was to *the Fauxbourg generally*. That the latter circumstance took place in 1792, 1793, or 1794, does not particularly recollect.

NOTE F.

IN Spain the Justinian code is declared to be the common law of the kingdom, which is to decide in all cases where the edicts are silent. This appears not only from the practice of citing from that code, but among a number of other authorities, by the following: Gom. in leges tauri, page 4, No. 1. "In this kingdom in the decision of cases, first and above all we are to be ruled by the laws of Toro, afterwards in their order by the ordinances and edicts of this kingdom, and the laws of the Partidas, although usages and customs are not prohibited, but afterwards, where these are deficient, we must determine according to the common law of the Roman jurisconsults and the emperors."

By referring therefore to these sources we discover the law of Spain on the subject of alluvion, and I believe, without the slightest ambiguity, establish the following positions:

1. That the bank of a navigable river is, to the water's edge, the private property of the owner of the adjacent soil, though the public are entitled to its use for the purpose of navigation.

2. That the bank comprehends all the land down to the usual summer channel of a river, but is not affected by a periodical or accidental swell of the river.

3. That when the land shall encrease either by alluvion or the retiring of the water, that the space thus gained becomes the property of the proprietor of the original soil, but that the publick retain their use of the new bank for the purposes of navigation.

4. That the interposition of a public road does not form any impediment to the acquisition of this right.

5. That when an alluvion is once formed its future encrease belongs to the proprietor of the first alluvion.

.....

I. POINT—*ROMAN LAW.*

Dig. lib. 41, *tit.* 1. 30. § 1.—"Celsus the son, says, if a tree grows on the bank of a river which is opposite to my land, the tree is mine, *because the soil itself is my private property, though the use of it is understood to be in the publick*, and therefore when the river is dried up, it shall belong to the adjoining proprietors, because the publick has no longer the use of it.

2. *Inst. tit.* 1, § 5.—"The use of banks as well as of rivers, by the law of nations, is publick, and any one has a right to moor vessels to them, by ropes to the trees growing thereon—to deposit their lading there—as well as to navigate the river; but the property thereof belongs to those to whose land they join, for which cause the trees growing thereon belong to them."

SPANISH LAW—I. POINT.

3 *Partidas*, *law* 6, *tit.* 28—"The rivers and ports and publick ways, belong to all men in common, so that strangers may use them as well as inhabitants. *And although the banks of rivers belong as to the dominion, to those to whose estates they are joined*, yet notwithstanding this every man may use them, tying their vessels to the trees which grow thereon; mooring their ships, and depositing their sails and merchandize thereon, and the fishermen may also place their fish there, and sell them, and dry their nets and use the shores for all such things as belong to their trade."

Ibid, *law* 7.—"All the trees which are on the banks of the rivers belong to those who have the ground adjoining to the banks, and they may cut them or cause them to be cut, or do with them what they please."

.....

II. POINT.

Dig. lib. 43. *tit.* 12, § 5.—"A bank properly defined, is that which contains the river in the natural course of its waters; but it does not change its banks when it is at times swelled, either by showers or by the sea, or by any other cause, for no one has ever yet said that the Nile, which covers Egypt by its encrease, has thereby changed its banks, but when it is reduced to its usual height, the banks of its channel may be dyked in. But if it shall have naturally risen as to obtain a permanent encrease by the confluence of another river, or by any other means. without doubt in that case, we should say it had changed its banks, in like manner as if, having changed its bed, it should begin to run in another course."

Ib. §.—"If a river shall overflow, but not make to itself a new bed, then that is not publick which is thus overflowed."

.....

III. POINT.

C. lib. 7, *tit.* 41.—"Although it may be not lawful to change the course of a river by making another by manual labour, yet it is not prohibited to guard its bank against the force of a rapid river—and when having left its former bed, it shall make another for itself, the land which it surrounds shall belong to the first proprietor; but if this take place by degrees and is thus applied to the other part, that by the law of alluvion shall belong to him whose land is thus encreased."

Ib. § 3. *Ed. Theod. & Valent.*—"By this law, which we sanction as perpetual, we order that whatever is acquired to the proprietor by alluvion (either in Egypt by the Nile, or in the other provinces by other rivers) shall neither be sold by the treasury, nor demanded by any other, nor separately estimated nor burthened with duties."

Dig. lib. 41. *tit.* 1. 7. § 1. & *Inst. lib.* 2. *tit.* 1. § 20—"Whatever the river adds to our land is ours by natural law; that shall be considered as added by alluvion, which has encreased by such slow degrees that we do not know how much, and what particular time it was added—but if the force of the river shall detach a part of thy field and add it to mine, it shall remain thy property."

.....

SPANISH AUTHORITIES—III POINT.

3 *Partidas, law* 26—"Rivers *(a)* swell sometimes so that they take away and diminish the inheritances that are situate on their banks, and they give to and encrease others that are on the opposite side.—Therefore we say that whatever is carried off by a river by little and little so that the quantity cannot be perceived because it is not taken off in a body, this shall be gained by the owner of that inheritance to which it is added."

Ib. law 31—"Rivers sometimes change the places in which they used to run, making to themselves a new course, and leaving dry the place where they formerly flowed—And whereas contestations may arise who ought to have the part that is thus left dry, we say that it belongs to those whose inheritances adjoin, each one taking a part according to his front on the river, and those through whose land it begins to run anew, shall lose the ownership thereof, for the space which it covers, which from that time shall be of the same nature with the other place over which it used to flow, and shall be changed into publick property like the river.

.....

IV. POINT.

Dig. lib. 41. *tit.* 1. § 38.—"Attius had a field on the publick road—Beyond the road was the river and the land of Lucius Titus; the river by little and little encroached and took away the land which lay between the road and the river, and afterwards the road itself—afterwards by degress it receded, and by means of

(a) This is to be understood of a *public river. Com. Greg. Lopez.*

alluvion again occupied its former bed—On this case he answers, when the river took away the land and the publick way, the encrease on the other side the river belonged to him whose lands were there; afterwards when by little and little it retired, it took it away again from him whose lands had been encreased, and added to him whose lands were beyond the road, *because his land was nearest the river;* that however which belonged to the publick [the road] was not acquired by any one Nor was the road (he says) any impediment to prevent the land which was made beyond the road from becoming the property of Attius."

Ib. 30. § 3....Alluvion restores that land which the force of the river hath taken away; therefore if the land which was between the publick way and the river be occupied by the river, (whether this happen by little and little or not) and it be restored at once by the retiring of the river, it belongs to the former proprietor. *For rivers perform the office of publick assessors, they adjudge private property to the publick, and publick property to private persons.*"

.....

V. POINT.

Dig. 41. 1. 56....An island arose in the river opposite the front of my land so that its length did not exceed the front of my property; afterwards by degrees it encreased and extended itself opposite the fronts of my upper and lower neighbours—I ask whether the encrease is mine, because it is added to my property, or whether it is the right of him to whom it would have belonged if it had first arisen at the extremity of its present length?

Proculus answers: The river in which you state the island to have arisen in such manner that it does not exceed the extent of your front, if it has the right of alluvion, and the island in the beginning was nearer your land than the other shore, the whole is yours—although it hath so happened that the island hath extended opposite the part of your upper and lower neighbours, or even though it should extend so as to be nearer the land of him who possesses the opposite shore.

.....

NOTE G.

AFFIDAVITS OF LA ROCHE AND SEGUR.

LA Roche, being duly sworn, doth depose and say, that in the year seventeen hundred and ninety-five, and for some time previous thereto, Laurent Segur, the father-in law of this deponent, had a contract for supplying the royal navy of Spain with masts. That in the spring of the said year, a very large raft of masts

having come down the river, and that part of the shore below the city where they had been usually placed, being very much encumbered, the said Segur desired the deponent to go to the governor (then the baron de Carondelet) to get his directions where he should deposit the said masts.

That the deponent accordingly went to the Baron de Carondelet, with Mr. Lovio, the minister of marine, who, after hearing the statement of the case, directed the deponent to go to Bertrand Gravier, and request him in his (the governor's) name, to give permission to lay said masts on the batture in front of the fauxbourg—adding that if Gravier refused, he would endeavour to find some means of making him consent.

That the deponent accordingly went to Gravier, with the governor's message, who readily consented, and the masts were accordingly placed on the batture, where they remained for a long time, at least eighteen months.

And this deponent further saith, that some time after the period above spoken of, and as he thinks in the year seventeen hundred and ninety-eight, Bertrand Gravier being then dead, he was again sent on a similar message to governor Gayosa, then governor of the province, who directed the deponent to go to John Gravier, the present proprietor, and ask his permission to lay up the masts on his batture, which the deponent did. Gravier consented, and the masts were accordingly placed on the batture opposite to Mr. Eva's the captain of the port, and from thence upwards.

And the deponent further saith, that Bertrand Gravier had for a number of years, a very large brick-kiln and that he always took the earth for the same, from the said batture, and from no other place.

ROCHE.

Sworn to and signed before me,
March 21st, 1808.

B. VAN PRADELLES,
Justice of Peace.

LAURENT SEGUR, being duly sworn, deposeth and saith, that he sent the above deponent La Roche, to the governors Gayosa and Carondelet, at the several periods and for the purposes mentioned in the preceding deposition, and that the answers then reported to him by the said La Roche, as coming from the Baron de Carondelet, governor Gayosa, Bertrand Gravier and John Gravier, perfectly accord with the statement in the above deposition.

L. SEGUR.

Sworn to and signed before me,
March 21st, 1808.

B. VAN PRADELLES,
Justice of the Peace.

MASSACHUSETTS DISTRICT, MAY, 1809.

Peter H. Natterstrom, Administrator of John Taylor, deceased,

VS.

Ship Hazard, William Smith, late Master.

[The law maratime will not sustain a claim for wages, by the legal representatives of a seaman, beyond the time of his death, when the engagement was by the month.

There is no express decision of this point to be found in the English books, and much diversity of opinion prevails among the elemental writers. In the case of *Walton, administrator of Strum, vs. the ship Neptune*, in the District Court of Pennsylvania,* Judge *Peters* decreed wages to the representative of a deceased seaman subsequent to the period of his death. The Judge appears to have relied chiefly upon the 7th art. of the laws of Oleron, the fact that the ship had carried freight and his construction of the shipping articles, that the contract is *for the voyage* though monthly wages are stipulated. The principle was adopted by Judge *Washington*, on an appeal to the Circuit Court for the same District, in the case of *Jackson, vs. Sims*.†

It is much to be wished that the question could be brought before the Supreme Court; but it is not probable that a case may soon occur of sufficient magnitude to authorize an appeal to that tribunal.]

DAVIS, *Dist. J.*‡ John Taylor, on the 18th July, 1805, entered on board the ship Hazard, at Boston, as a mariner, for a voyage to the North-West coast of America, from thence to Canton, in China, and back to Boston, at the monthly wages of sixteen dollars, and signed articles in common form. The ship, soon afterward, sailed on the proposed voyage, and on the 17th day of October, 1805, Taylor, with three other seamen, while manœuvring the

* Pet. Adm. Dec. 142. † Ibid. 156.

‡ From a copy corrected by Judge Davis.

ship, in a gale of wind, were carried overboard by a sea, and drowned. The ship performed the contemplated voyage in safety, and returned to Boston, on the twenty-third June, 1808.

It appears that Taylor received thirty-two dollars advance wages, before the ship sailed from Boston, and that disbursements were made to him on the voyage, by the master, to the amount of thirty-five dollars and fifty cents, exceeding, in the whole, the amount of wages, to the time of his death. The respondents allege, and it is not denied by the libellant, that by reason of the death of said Taylor, and of the three other seamen who perished with him, the master of the ship was obliged to proceed to Rio-Janeiro, where he arrived on the 11th November, 1805; there to hire four other seamen, which he accomplished at high and extravagant wages, to replace those who were lost, and to enable him to prosecute the voyage aforesaid; and they further allege, "that it is and ever has been the usage, custom, and practice of the trade, in which said ship was employed, in the voyage aforesaid, for the owner or master of the ship or vessel to pay, and the legal representatives of any mariner belonging to a ship or vessel, who had signed articles of agreement or a shipping paper, and happened to die on the voyage, to receive the wages accruing to such mariner, from the time of his entering on board such ship until his death, at the rate expressed in such articles or shipping paper, in full satisfaction of all claims and demands of such representative against the owner or master of said ship or vessel, for the wages or services of such deceased mariner."

This cause has been amply discussed, and it remains to determine the only question on which it depends; what is the legal effect and operation of the death of the mariner, Taylor, in manner and at the time above stated, on his wages? For the libellant it is contended, that the same amount is by law due, as if he had survived and continued in the service of the ship during the whole voyage. On the other hand, it is contended for the respondents, that his wages, at the stipu-

lated rate, are only to be reckoned to the time of his decease; and, of course, that the libel ought to be dismissed, as more than the amount of wages, due on that principle of computation, had been paid to the deceased.

The counsel for the libellant rests his claim on the 7th article of the laws of Oleron, the 19th of Wisbuy, and the 45th of the Hanse Towns; and on a late decision in the Circuit Court of Pennsylvania, *Jackson's administratrix vs. Sims*, affirming a decree of the District Judge, by which full wages, for the whole voyage, were given to the legal representative of a seaman who had engaged for a voyage from Philadelphia to Batavia, and back, and who died, in the course of the voyage, at Batavia. [Peters adm. decisions 157.]

In the examination of this subject, I shall first inquire into the genuine meaning and import of the ancient ordinances above mentioned, in reference to the point under consideration. We have, I presume, a correct text of the laws of Oleron, in the *Us et Coustumes de la Mer*, by Cleirac. The 7th article prescribes the duties of the master, when a mariner falls sick, in the service of the ship. It directs, that he shall be put on shore, and that suitable humane provision shall be made for him. The closing paragraph, which, alone, has special application to the question now under consideration, runs thus; "Et si la nef estoit preste à s'en partir, elle ne doit point demeurer pour luy; et s'il guarit, il doit avoir *sou loyer tout comptant*, en rabatant les frais, si le maistre luy en a fait; Et s'il meurt, sa femme et ses prochains *le doivent avoir pour luy*." "And if the vessel be ready for her departure, she ought not to stay for the said sick party; but if he recover, he ought to have *his full wages*, deducting only such charges as the master has been at for him. And if he dies, his wife or next of kin shall have it."

I resort to the same author for the correspondent articles in the other ordinances, not having been able to find any copy of the original text.

Ordinances of Wisbuy, Art. 19.

Si le matelot tombe en infirmité de maladie, et qu'il convient le porter à terre, il y sera nourri comme il estoit dans le bord, garde et servy par un valet, et s'il vient en convalesience *sera paye de ses gages ;* et s'il decede, *ses gages et loyers seront payez* à sa vefue, ou à ses heretiers.	If a seaman falls ill of any disease, and 'tis convenient to put him ashore, he shall be fed as he was aboard, and have somebody to look after him there ; and when he is recovered, *be paid his wages ;* and if he dies, *his wages shall be paid to his widow or heirs.*

Laws of the Hanse Towns, Art. 45.

Que s'il revient en convalescence, *il sera paye de ses gages tout ainsi comme s'il avoit servy*, et s'il meurt, ses heretiers *les retireront entierement.*	If he recovers his health, *he shall be paid his wages, as much as if he had served out the whole voyage ;* and in case he dies, his *heirs shall have what was due to him.*

I adopt the translation given in the "Sea Laws," first published in England, in the reign of Queen *Anne*, not from a respect to the translation of those ordinances, in general, as contained in that work, for in several instances it is palpably incorrect, but because, from its long standing in our language, it is entitled to consideration, and in the articles now cited, it gives, to my apprehension, the sense of the text, with sufficient correctness. Stress has been laid, by the respondents' counsel, on a supposed mistranslation of the article from the laws of Oleron. It is said that the word *comptant* means *money down*, and, that the addition of the word *tout*, to the word *comptant*, only renders the expression more emphatick. However this may be in modern *French*, and there are certainly respectable authorities in support of the criticism, I am convinced, that something more was intended by the phrase, as used in the article cited, and that it was designed to express not merely the mode of payment, but has reference to the *quantum*.

It is evident from Cleirac's comment, that he so understood it; and I consider the meaning to be the same, as is

conveyed by the word *entierement*, which he uses in translating the cited article of the laws of the Hanse Towns. *Valin*, in his discussions relative to wages, frequently uses the phrases *en entier & en plein*, which are of equivalent import. But these modes of expression do not, necessarily and universally, imply an absolute payment of the wages for the *whole voyage*. Such, indeed, is their frequent application; but we also find expressions of this description employed, when a payment of wages, for a less time than the whole voyage is most evidently intended.

The third article of the laws of *Wisbuy* directs, that if a master discharge a seaman without just cause, after the commencement of the voyage, he shall pay him "*entierement, tous les gages promis.*" This passage, in the Sea Laws, is rendered "all his wages as much as if he had performed the voyage." This is a free translation, but it gives the sense of the original; and the regulation corresponds with the principle of the 13th. article of the laws of Oleron, by which an offending seaman, if tendering amends, is to be retained, and if discharged after such offer, is entitled to *full wages*, as if he had continued in the ship. The expression there is "aussi bon loyer comme s'il estoit venu audedans" —"as good hire as if he had come in the ship," equivalent to *entierement*, tous les *gages promis*, in the third article of the laws of *Wisbuy*, and to *tous leurs loyers*, in the 20th article of the laws of Oleron, applied to a contract by the *run*; when the voyage is abridged by the act of the owner or the master, in proceeding, with the ship, to some port nearer to the place of departure and destined return, than was stipulated in the contract. Other instances might be cited, where this meaning must be understood, but there are also many, in which expressions of this description must have a more restrained construction. Valin, in commenting on a royal ordinance of France, framed to determine a question relative to ships ordered to a certain station, and there to wait for convoy, recites it in the following terms; "la solde des gens des e'quipages seroit payèe *en plein* du jour que les

navíres auroíent mis à la voile, jusquàu jour qu'ils auroient mouillé dans la rade du convoi; que depuis qu'ils auroient mouillé jusquau jour de depart de la flotte, ils n'auroient que la demi—solde, & qu'apres le depart, la solde le urseroit continué *en entier*, pour le reste du voyage"—"The wages of the crew shall be paid *in full* from the day of the vessels sailing to the day of their mooring in the road of the convoy; from the time of their joining the convoy to the departure of the fleet, they shall have only half wages, and after the departure, their wages shall continue *in full* for the remainder of the voyage." It is here apparent that the phrases *en plein* and *en entier*, apply to the *rate of wages*, and that for the portions of the voyage specified, they shall be without deduction. A similar use of this expression we find, relative to another ordinance, that of 17th October, 1748, respecting vessels waiting for convoy in the colonies. Speaking of the crew, he says, "seront payés de leur salaries *en entier*, pendant le sejour que lesdits navires auront fait dans les desdites isles, jusqu'à concurrence du terme de six mois, et seulement de la moitié pour le temps excédent ledit terme"—"They shall be paid their hire *in full* while said vessels shall remain at the aforesaid islands, for the term of six months, and half wages, only, for the time exceeding said term." Vol. II. 698.

The 11th article of the ordinance of Louis XIV. relative to seamen's wages runs thus; "Le matelot qui sera blessé au service du navire, ou qui tombera malade pendant le voyage, sera payé de ses loyers et pansé au depens du navire"—"A seaman who shall be wounded in the service of the ship, or who may fall sick during the voyage, shall be paid his wages, and be cured at the expense of the ship." As it relates to the wages of the sick seamen, this corresponds with the 7th article of the laws of Oleron. The words *tout comptant*, or terms equivalent, are not, indeed, inserted; but both *Valin* and *Pothier* understand the meaning to be the same as if it included such expressions. The latter writer, in commenting on this article, observes, "Le matelot tombé

malade ou blessé au service du navire, gagne *en entier* son loyer, non seulement lorsqu'il est resté dans le navire, mais même, dans le cas auquel ayant été mis à terre, dans un port, ou le navire a relâché, il y auroit été laissé, s'étant trouvé hors d'état d'être rembarqué, lorsque le navire est reparti"—"The seamen who may become sick or wounded, in the service of the ship, is entitled to his wages *in full* not only while remaining on board the ship, but also if he should be put on shore in a port where the ship may have stopped, and should be there left, on account of his being unable to return on board the ship, at the time of her departure." [Louage des matelots, sect. 2.] It is here apparent that the phrase *en entier*, which must be admitted to be equally forcible with the words *tout comptant*, is applied, by this very accurate writer, to express nothing more, than that there shall be no deduction for sickness, or for absence from the ship, from that cause.

It may be said, that the commentator, in giving this construction to the article, had in view a subsequent article, of the same ordinance, article 13th, which directs, that the heirs of a seaman engaged by the month, and who may die during the voyage, shall be paid his wages to the day of his decease. But the 11th article in general, and its provisions in favour of a sick seamen, apply not merely to those engaged by the month, but to those engaged on other terms. Further, it is evident, from Pothier's comment on the 13th article, that his conceptions of the dispositions made by the 11th article, were formed on distinct grounds, and instead of having a prospective view to the 13th article, while discussing the 11th he found the application of the 13th article, relative to heirs, on the provisions made by the 11th article, relative to the sick seamen while alive. The heirs, he says, shall, of course, have the wages accruing during sickness, and the disposition of this article is but an exact consequence of article 11th. "La disposition de cet article n'est qu'une consequence exact de l' article 11th." [Louage des matelots, sect. 2.]

In this there is, to my apprehension, a perfect correspondence between *Pothier* and *Valin*. The latter writer, commenting on the 13th article, which relates wholly to what the *heirs* shall recover, commences his remarks by stating, what the deceased seamen had acquired. " Le matelot ayant gagné ses loyers jusqu'à son décès arrivé pendant le voyage, et cela, aussi bien durant le temps de la maldie que pendant celui qu'il a rendu un service effectif au navire, il est bien juste qu'ils passent à sa veuve et heretiers." " The seaman having earned his wages to the time of his death, happening, during the voyage, as well during his sickness, as for the time when he rendered actual service on board the ship, it is just that they should go to this widow and heirs."

In this passage, Valin evidently has reference to the 11th article. In his comment, on that article, he denominates the disposition which it makes relative to wages of a sick seaman, as a right to wages *en plein*; an expression which must be understood, as it is used by Pothier, in this connexion, to intend, merely, that there shall be no diminution of wages on account of sickness.

It is to be understood, that I do not consider the dispositions made by the articles of this ordinance, as an authoritative settlement of the question; though they are most explicit in their terms. I only resort to them and to the commentators above mentioned, with a view to a right understanding of the phraseology employed in the articles of the laws of Oleron, Wisbuy, and the Hanse Towns, all of which are given in the *French* language by *Cleirac*, and from whose work the received English translation appears to have been made. From this examination, I am satisfied, that the terms *tout comptant*, *en entier*, or *entierement*, as applied to wages, do not, necessarily, mean wages for the whole voyage; that they admit of a different and more limited application, according to circumstances, and that the true meaning, in the respective instances, in which they are employed, must be determined from the subject matter and the connexion. *Noscitur ex sociis.*

I may further add, that it is not unfrequent, where the meaning might be otherwise equivocal, to add expressions, which render the sense perfectly certain, such as "comme s'il avoit servi tout le voyage," or the like. Applying these views of the language of the law, which we are considering, to the 7th article of the laws of Oleron, and to the correspondent articles in the laws of Wisbuy and of the Hanse Towns, I cannot find, that those articles either express or intend that the heirs of a seamen dying in the course of the voyage, shall recover wages in his right, as if he had lived and served out the voyage. The object of all those articles is to make suitable dispositions relative to seamen falling sick on a voyage. They direct how they shall be treated, and what shall be the results as respects their wages, in case of recovery, or of death. The expression, *tout comptant*, in my apprehension, means nothing more, than that there shall be no deduction on account of sickness, either as against the seaman himself, if he recover and claim his wages, or against his heirs in case of his decease. Two interesting points were established, by these articles, both wisely and humanely calculated to sooth the sorrows of the sick, or disabled mariner; that his calamity, if not produced by his own criminality or fault, should not diminish his stipulated wages, during the existence of his disability, or his necessary absence from the service of the ship from that cause; and that in case of his death, all that was due to him should descend to his heirs. Both these provisions seem so perfectly reasonable, that, it may at first view appear, that a formal article, could hardly be necessary to enforce them, and we may, on this ground, be induced to apprehend that something more was intended. But the first point is, even now, occasionally questioned by the ship owners and masters, and, we may easily satisfy ourselves, that, it then appeared necessary that both should be declared. The application of the Roman law *de locatione et conductione*, to which Pothier expressly refers, for a construction of the contract of hiring of labour, in general, and for the hire of seamen, in particular, would ex-

clude a claim for compensation, during the disability of the servant or labourer. But, as generous masters, says this esteemed commentator, will not insist on a strict enforcement of their rights, but continue the compensation of a sick servant, notwithstanding his disability to perform his stipulated services, so the law marine in relation to mariners, converts into an obligation, what in other instances of hire, is the result of benevolence. The object of the law, he adds, is, for the encouragement of seamen, and as a compensation for the risk which they run, of an entire loss of wages, from inevitable accidents occuring to the ship, or from a destruction of the voyage. *Louage des matelots.*

Doubts derived from the rules of law relative to entirety of contracts, and perhaps also some principles of the law *de societate*, might have rendered necessary the express declaration, in favour of heirs, that is made by the articles under consideration. A simple provision was made by the *Consolats del Mare*, and we learn from Cleirac, that it was the express object of an ancient ordinance of France, to declare such right of succession in favour of the heirs of mariners, dying on the voyage. " Si le marinier meurt a voyage, les ordonnances de France conservent ses biens à ses heretiers en termes generaux, sans parler precisement, comme fait ce jugement, des loyers ou gages meritez ou à meriter." " If a mariner die on the voyage, the ordinances of France preserve his property to his heirs, in general terms, without specifying, as this article does, wages earned or to be earned." *Cleir.* 34. *on art.* 7. *of laws of Oleron.*

It is not necessary, therefore, in order to satisfy the expressions in the laws of Oleron, and in the other ancient marine codes, to consider them, as giving to heirs of a mariner, dying on the voyage, the same amount of wages, as the deceased would have received, if he had lived until the termination of the voyage. I admit, indeed, that the phrase *tout comptant*, in the laws of Oleron, is to be understood to apply to the heirs as well as to the seaman, as the word *entierement* is, in the laws of the Hanse Towns, and, that these

terms are well enough rendered, by the expression *full wages*. Still it remains to be determined, what is the precise import of these expressions, used in this connexion.

The apparent or plausible ground, on which a diminution of wages may be claimed, by a master, against a seaman, being, in any case, suggested, will enable us to determine in what sense, the words *en entier* or *entierement*, are to be understood. When a seaman is discharged without good cause, no question could occur to any reasonable mind, relative to his earnings to the time of his discharge. Whatever doubt might arise, in regard to his claim for wages, would respect the remainder of the voyage, from which he was wrongfully expelled. In such a case, therefore, we must understand, the term *entierement*, in the third article of the laws of Wisbuy, to intend wages for the whole voyage. But in the cases supposed by the 7th article of the laws of Oleron, the only ground, which could be suggested for a subtraction of wages, is the sickness and disability of the mariner: and when it is said, he shall, notwithstanding, receive his wages *tout comptant*, it is apparent, that nothing more is intended, than that no deduction shall be made on that account. An application of this construction, to the different cases, that might occur, will test its solidity.

1st. With regard to the seaman himself. If he recover, says the law, he is to have his wages *tout comptant*. If after such recovery, he rejoin the ship, before the completion of the voyage, his right to wages *tout comptant*, or to full wages, must, in such a case, evidently mean, that no diminution shall be required on account of his non-performance of duty or absence from the ship by reason of sickness. His claim to wages, for the residue of the voyage, will depend on future services and circumstances and not on the provisions made by the law relative to the operation of his sickness. A like construction of the article must, I apprehend, be given, if a seaman, who may be left abroad sick, should recover and return home, before the arrival of the ship, and the ship should afterward arrive in safety. If the sickness be supposed to be

of such continuance, that he be not able to return to the ship during the voyage, but he survives the prosperous termination of the voyage and returns home after the arrival of the vessel; he shall in like manner, by the articles cited, have wages *tout comptant*, or *entierement*, or *full wages*. The wages in this case, would, indeed, be for the *whole voyage;* but the force and meaning of those operative expressions are the same as before. He shall receive wages for the whole voyage, not because *tout comptant*, *entierement*, or *full wages*, necessarily and exclusively mean wages for the whole voyage; but because, as in the other case, they protect him from a deduction from his wages on account of sickness, and the sickness or disability, which entitled him to indulgence, is supposed to have continued until the termination of the voyage.

2d. In regard to the *heirs* of such *deceased seaman*. I understand the same expressions, by fair implication, to extend to them, but in the *same sense*. If the sick seaman survive the prosperous termination of the voyage, and afterwards die, without having recovered his wages, his heirs shall recover them *entierement* or *tout comptant*. But, in this case, the same remarks are applicable, which have been suggested relative to a demand for wages by the seaman himself, after such conclusion of the voyage; and, for the same reason, the meaning of the terms *entierement* or *tout comptant*, remains, in this case, equally unchanged. The right to wages, in such a case, for the whole voyage, results not from the mere force of those terms, but from this concurrent, essential fact, the continuance of the disability or absence from that cause, commensurate with the voyage.

The death of the seaman, before the termination of the voyage, presents a case involving the very point in question. In such case, also, the heirs shall receive the wages *entierement* or *tout comptant*. But we ought to understand those terms, in the same sense as they are evidently to be understood, in the preceding cases. If we construe them as giving to the heirs the wages, for the residue of the voyage, we, in

fact, change their meaning, or include an idea not implied in those terms, in the other cases supposed. This would appear to me an inadmissable mode of construction, as the subject matter, to which the terms are applicable, is unchanged. In the case of a seaman wrongfully dismissed from a ship, his connexion with the ship is dissolved by the mere injurious act of the master. This act gives to the seaman an immediate right to wages for the whole voyage, subject, indeed, to contingencies which may defeat the voyage and of course his claim. But the object of the provisions relative to disability was not to give a new right to the seaman, in consequence of his falling sick, but to protect him from loss. I am satisfied, therefore, that the expressions referred to, must, in case of death during the voyage, be understood in the same sense as in the other cases, and that they mean nothing more than a security against any diminution of the wages, on account of sickness.

In this manner, it appears to me, these articles were understood by the commentators; and I find no intimation, either in *Cleirac* or *Valin*, that they considered the heirs entitled to wages by these articles, beyond the death of the seaman, whom they might represent. Cleirac, under the 7th. article of the laws of Oleron, mentions the ordinances of Charles V. giving to the widows or heirs of a seaman, dying on the outward voyage, one half the wages agreed for, and, if dying on the homeward voyage, the whole wages. He remarks the correspondence of this provision with the dispositions made by the *Consolato del Mare*, which also provides, that the heirs of a seaman, who was engaged by the month, shall be paid according to the time that he may have served. He then proceeds to notice a more favourable provision for widows and heirs of deceased seamen in ships of war, or long voyages; that, if a man should die, on the first day after the commencement of the voyage, his heirs should be paid for the whole voyage. "Ses heretiers seront payés pour tout le long du voyage." If *Cleirac* intended to compare this generous provision with the disposition made by the

laws of Oleron, he could not denominate it, *more favourable*, on the construction contended for by the libellant's counsel in this case; for, on such construction, the provision by the seventh article of those laws, would be, in fact, the same as is noted by *Cleirac*, to have been observed on board ships of war. But if he is to be understood as making a comparison with the regulations of Charles V. and of the *Consolato del Mare*, previously mentioned in his note, it would still appear unaccountable, why this instance of such generous provision should be alone selected, and that he should be silent as to a like disposition, made by the very article on which he was commenting, according to the construction contended for by the counsel for the libellant. The strongest aspect in *Cleirac*, in another direction, is in the expression, "loyers ou gages *meritéz ou à meriter*," in the note above quoted. But I understand the word *meritéz* to refer to the wages earned while the mariner was performing service, and *a meriter*, not to have reference to any supposed accruing of wages after death, but to those earned or considered as earned during sickness and disability, or absence from the ship from such causes.

Valin, it is well known, is copious and minute; and abounds in references to the laws of Oleron, Wisbuy, and the Hanse Towns, and to Cleirac's commentary. I cannot find, in his ample and very valuable work, any recognition of the doctrine, that by the laws of Oleron, Wisbuy, or the Hanse Towns, the heirs of seamen dying on the voyage, should recover wages, as if such seaman had served out the voyage.

The 15th article of the ordinance of Louis XIV. provides, that the wages of a seaman, killed in defending a ship shall be paid in full as if he had served the whole voyage, provided the ship arrive in safety. We should expect the commentator, under this article, to remark its correspondence with the laws of Oleron, Wisbuy, and the Hanse Towns, relative to seamen dying from any other cause, if, in his opinion, those laws were to be thus understood. On such extended

construction, also, of the 7th. article of the laws of Oleron, we should expect the commentator to notice its repugnancy to the 11th. article of the ordinance of Louis XIV. We find no such intimation; but from a careful inspection of his comments, particularly on articles 11th. 13th. and 14th. I am satisfied, that this able writer did not understand the laws of Oleron, Wisbuy, and the Hanse Towns, as giving a claim to wages beyond the death of the mariner. It should be observed also, that if the 7th. article of the laws of Oleron, did, in true or received construction, give full wages for the whole voyage, *in all cases of death, on the voyage*, without fault on the part of the mariner, there could be no necessity, as those laws constituted a portion of the marine law of France, to make the special and exclusive provision of that nature, for a seaman killed in defending the ship, as is done by the 15th. article of the ordinance of Louis XIV.

It is material in the next place to enquire, how these ancient marine codes have been generally understood in the countries originating them. I can find no evidence, that they have, in any European country, been applied in the sense contended for, in this case, in support of the libellant's claim. It is well observed by Valin, that next to equity in a law, are its perspicuity and brevity. The 7th. article of the laws of Oleron and the correspondent articles in the other ordinances, are sufficiently brief. They are not remarkable for perspicuity, and, on the construction contended for, in support of the present claim, would not be equitable. There would result one fixed, invariable rule, in case of the death of a seaman, during the voyage, whatever might be the nature of the engagement, whether by the month, for the voyage, part profit, or freight. If there had been no other resource, some tolerable system might, by a course of decisions, have been founded on the basis of this article, relative to the cases of death of mariners during the voyage; but it does not appear that the law upon this subject has been extracted from this source, excepting so far as relates to the operation on wages of sickness, and disability of a seaman.

The fact is, that exact and definite provisions, reasonably accommodated to the necessary diversity of occurrences, had before been established by an excellent and venerable code, originating among a very intelligent and highly commercial people. I refer to the Consolato del Mare; the 127th. article of which expressly provides, that the heirs of a seaman, engaged by the month, and dying on the voyage, shall be paid his wages for the time of his service. *Se il marinaro è accordato a mesi, et morirà, sia pagato, et dato alli suoi heredi per quello, che havessi servito.* The preceding article directs, that if the engagement be by the voyage, half or the whole shall be received by the heirs according to the period of the voyage in which the death should occur.*

These articles of the *Consolato* are quoted by *Cleirac*; and from the manner in which *Valin* refers to them, and to Cleirac's quotation, I understand him to mean, that they constituted a portion of the received marine law of France, on this subject.

* There is a diversity, in the different editions of this work, in the numbers of the chapters. The edition here quoted is that of Leyden; printed in 1704. In *Cleirac's* commentary, the chapter here referred to as the 127th. is quoted as the 130th. *Valin* cites it by double numbers. The *Consolato del Mare* contains precise regulations on several topicks, not contained, or only incidentally mentioned, in the laws of *Oleron*, of *Wisbuy*, or of the *Hanse Towns*. It is to be regretted that a work, so comprehensive and valuable, should be so rare, and it appears surprising that an English translation of this venerable code has never yet appeared. A French translation, with commentaries and dissertations of much promise, has recently been announced. [Anthology, for February last.] It may be hoped, that this example will be duly emulated, and that a long time will not elapse, before our *Bibliotheca Legum* shall present this valuable work, in our own language.

[A translation of that part of this celebrated code which relates to the manner of proceeding before the consular court, shall be commenced in the ensuing number. The whole work shall appear as speedily as the editor can prepare it for the press. The French translation, to which the learned Judge alludes, is published, as we learn from a correspondent, in two volumes, octavo; but the editor has not seen it.] Ed. Law Jour.

I have no means of information, of the application of the laws of Wisbuy, in this particular, in the countries, where they may be supposed to have had special influence or authority. In determining on the application of the laws of the Hanse Towns, it would have been satisfactory, to have consulted *Kuricke's* commentary on the revised code of those laws, of 1614. This work I have not been able to find; but in "*the Ship and Sea Laws, of Hamburg*" as contained in *Herman Langenbeck's* treatise, published A. D. 1727, there appears to be an affirmance of the law of *Oleron*, as to the manner in which a seaman, falling sick on the voyage, shall be treated; and, if he dies on the outward passage, the heirs are to have half his wages and privilege, if on the return voyage, the whole; deducting the expenses of interment. In this principal city, therefore, of the Hanseatick confederacy, we find an express partial adoption of the provisions, made by the *Consolato*, on this subject, with this only difference, that the Hamburg law, makes the same provision, whether, the contract be for the month or for the voyage, which the *Consolato* distinguishes. It is observable, that we do not find, in Langenbeck's commentary, any intimation, that, by the laws of the Hanse Towns, the heirs of a seaman, dying on the voyage, would be entitled to the whole sum, which such seaman would have earned, if he had lived to the end of the voyage. Such a disposition would have been materially different from that made by the 30th. article of the Hamburg laws, on which he was commenting, and if such diversity, in true construction, really existed, we must suppose it would have been noticed. The Hamburg regulations disregard the distinction that is made by the *Consolato del Mare*, between an engagement by the month, or for the voyage, as respects the amount of wages, to be paid, in case of death of a seaman during the voyage. The discrimination, made by the *Consolato*, is adopted by the Ordinance of Louis XIV. and, it is believed, was the previous maritime law of that country, by tacit adoption of that

provision in the *Consolato*. Pothier suggests a reason for the distinction. The seaman, who is engaged by the month, does not sustain the risk of calms, contrary winds and other impediments, which may prolong the voyage; however protracted, if not interrupted, or broken, so as to defeat a claim for wages, they are commensurate with the length of the voyage. Whereas one engaged for the voyage, runs the risk of an inadequate compensation for his services, by an accidental protraction of the voyage, beyond the term contemplated as the measure of his reward, when the contract was made. On this ground, says Pothier, the Ordinance proceeds, corresponding in this particular, with the *Consolato del Mare*, and, as a compensation for the different risks, is the distinction made. [Louage des Matelots.]

I proceed to inquire, how the law, on this subject, has been considered and received in *England;* a question, for obvious reasons, of material importance. The rules and proceedings in maritime matters, in that country, became ours, by express adoption, in the first New-England colony; (Plymouth Colony Laws, 48.) and the law on this subject, as understood and practised in that country, before our revolution, may be considered as making a portion of our law, unless, some other express provision, adverse decisions, or contrary received usages, either before or since the revolution, should have effected an alteration.

The foreign ordinances, on maritime affairs, have not the binding force or authority of law in England, not even the laws of Oleron, to which that nation have long been, and still are, particularly partial. The extent of the adoption of any article of those laws, in that country, and the sense in which they are received, can only be learned from the decision of their courts, and the approved treatises of their eminent juridical writers.

To Godolphin's "View of the Admiral Jurisdiction" there is annexed an appendix containing a translation of the laws of Oleron, with notes and observations. That part of

the 7th. article, which is relied on in this case, is thus rendered. "He ought to have his full wages *or competent hire*, rebating or deducting only such charges as the master hath been at for him, and, if he dies, his wife or next of kin to have it." To this is added the following note; "Executors of a deceased mariner, ought to receive the *wages due to him*."

I would here make the same remark as I have before suggested relative to the translation given in the "Sea Laws."

I do not introduce the translation, inserted in that appendix, from a respect to its general correctness, for there are some palpable and some whimsical errors.* But the translation, given in the treatise, of the 7th. article of the laws of *Oleron*, with the note, subjoined, appear to me to evince, that this learned civilian did not receive the article in a sense, which would support the present claim. Molloy, in referring to the articles of the laws of Oleron, copies the provisions relative to the seaman's right to wages, if he recover from his sickness, but altogether omits the provision respecting the heirs. He inserts the substance of that article of the Rhodian law, which subjects the master to the payment of

* A remark of this sort may seem to require verification. Two instances, only, will be mentioned in this place Art. 14th, "*Oster la trouaille trois fois.*" is understood, in this translation, to mean *three times lifting up the towel*, and it is thus copied into Molloy. The true meaning, *a denial of the mess three times*, is given in the *Sea Laws* and in other subsequent compilations.

Art. 9th. *Les mariniers doivent avoir un tonneau franc, et l'autre doit* PARTIR AU JECT, is thus translated; "The mariners also, ought to have one tun free and another *divided by cast of the dice.*" This rendering is followed in the *Sea Laws*, in Postlethwayt's Dictionary of Trade and Commerce, and in some later publications. It is evident from *Cleirac's* commentary, that the contribution to a Jettison, intended here to be directed, is not to be decided by *cast of the dice*. The seamen are to have one tun free, and the remainder of their *privilege* is to contribute its proportion. The article, says the commentator, "*ordonne pour les mariniers un tonneau, franc en la contribution, et veut que la reste participe au jet.*"

a year's hire, to the heirs of a mariner, drowned in consequence of insufficient tackling. In both these instances, if it were part of the marine law, as received in that country, that in case of a seaman's dying on the voyage, his heirs were entitled to recover wages as if he had lived and performed the voyage, it was certainly a strange and culpable omission not to insert or to intimate it, in an elaborate treatise "de Jure Maritimo." But my opinion, on this part of the subject, does not altogether rest, on omissions of this sort. Later and more accurate English writers than Molloy, are very clear and express on this point. Abbot considers the construction of the foreign ordinances as doubtful. In the English law books, he says, there is no general decision on the subject; but refers to a case (Cutter v. Powell. 6 Term. Rep. 320.) in which he says, it *seems to have been admitted*, that the representatives of a seaman, *hired by the month*, would be entitled to a *proportion of wages to the time of the death*. In a late respectable work, Abbot's statement is confirmed by observations altogether similar. Comyns on contracts, 377. An inspection of authorities on this subject, as well as a respect for the accuracy of the writers of those digests, has satisfied me, that it is not, and never has been, the received law in England, either in the courts of common law or admiralty, that the heirs of a seaman, hired by the month, and who may have died in the course of a voyage, are entitled to recover wages, as if the mariner had lived and served out the voyage. In the case *Chandler vs. Grieves*, 2. H. Bl. 606, on the motion for a new trial, the court obtained a certificate from the admiralty, of the law marine, relative to the right of a disabled seaman to wages. It was certified, that according to the usage of the admiralty, a seaman disabled in the course of his duty, was holden to be entitled to wages for the whole voyage, though he had not performed the whole. The result was, that the rule was discharged. The amount actually recovered in the case, was not to the conclusion of the voyage, though it has been

frequently so stated even by English writers; but the rule being discharged, judgment must have been according to the verdict, which, was only for wages to the time of the ship's departure from Philadelphia, where the disabled seaman was left. It is admitted, however, that the principle, certified from the admiralty, and on which, it may be presumed, the court of common pleas proceeded in discharging the rule to show cause, would authorize and require a recovery of wages, under the circumstances of that case, for the *whole voyage;* and such I have observed to be the just construction of the laws of Oleron and the other foreign ordinances. But we have no opinion from the admiralty, nor in the common law authorities, that wages are recoverable, after the death of a seaman, for the subsequent portion of the voyage; and it is observable, that such a position is not found to be maintained in argument, though, if correct, it would, certainly, forcibly apply in several cases reported in the books. "In the case of a mariner's dying in the course of the voyage" says a learned judge of the court of common pleas, "*it should seem* that he is entitled to a *proportionate part* of his wages, unless he be excluded by the specifick terms of his contract." [Justice *Heath*, 3. Bos. & Pul. 425. Beale vs. Thomson.] An observation of this sort, from a learned judge of the court, and the dubious, qualified language of Abbot and Comyns, that a *pro rata* recovery of wages *seems to be admitted* in case of a death of a seaman on the voyage, who was hired by the month, indicate their views on this subject, and are inconsistent with the supposition that they considered the law as giving wages for the *whole voyage* in such case, or that such is the received law in England, on that subject.

In our own country, the law and usage appear to have been the same; in Massachusetts I may say, uniformly so.

We find indeed no decision. A demand of this description does not appear to have been made in legal shape, until since the late decision in Pennsylvania. The libellants counsel was apprised, that the court would hear evidence, of

any usage in support of this claim. None has been offered, and it was frankly admitted, that the contrary usage had prevailed, with the exception above expressed.

The uniform usage, as alleged by the respondents, is satisfactorily maintained. To introduce a different rule, would, in my opinion, be to give a construction of the contract, not contemplated by either of the contracting parties, and not consonant to the law, on the subject, at the time when the contract was made. I perceive in the report of the case determined in Pennsylvania, it is intimated, that the extreme severity on ship owners, of the operation of the decisions in the district court, has produced a general practice of inserting a covenant in the shipping articles, that wages shall cease on the death of a seaman. The introduction of such provisions may be attended with difficulties, among a class of men, frequently uninstructed, attached to old forms and habits, and who may be jealous of an express stipulation, though, in reality, altogether consonant to a tacit construction, by which they had ever been governed. It would be injurious to require it, unless absolutely necessary. From my view of the law on this question, it does not appear to be requisite, unless it be to avoid controversy, on a subject on which there is a diversity of sentiment. I regret this collision with opinions, which I highly respect. It was incumbent on me, under such circumstances, to weigh, with great deliberation, the grounds of a different persuasion; but such being my opinion, after thorough examination, I consider it a duty to declare it. I ought here to suggest the relief afforded to my mind, in regard to difficulties of this description, by an interlocutory opinion expressed by the Hon. Judge Cushing, at the last circuit court in this district, in the case of Oystead Admr. *vs.* the ship Perseverance, and by the consideration, that the decision now given, if erroneous, may be revised and corrected in a higher tribunal.

The examination which I have made on this subject, has led me to an affirmative conclusion on the following points.

1st. That by general principles of law, on a contract of hire, no compensation can be claimed beyond the death of the party hired.

2d. That the laws of Oleron, of Wisbuy, or of the Hanse Towns, do not provide, that in case of the death of a seaman on a voyage, wages are recoverable beyond the time of his death.

3d. That the intent of those ancient ordinances, in the articles relied on in this case, was to determine the effect and operation of sickness or disability, incurred in the service of the ship, during the voyage, and to provide for payment of wages, without *deduction on that account*, either to the seaman, if he recover his health, or to his heirs in case of his death.

4th. That it does not appear that those ordinances have, in those countries where they are peculiarly authoritative, been used and applied as entitling the heirs to wages, for any time subsequent to the death of a seaman.

5th. That approved commentators, such as Cleirac and Valin, do not establish the construction contended for in support of this claim.

6th. That the *Consolato del Mare*, a work of approved authority, in case of an engagement by the month, and death on the voyage, expressly limits the wages to be recovered by heirs, to the time of the death of the mariner.

7th. That the law marine has not been otherwise understood and received in England, but in regard to an engagement by the month, and death on the voyage, appears to be consonant to the *Consolato del Mare*.

8th. That in Massachusetts, the usage has uniformly been to make payment of wages, in such case, only to the time of the death of the seaman, and the law has been considered as consonant to the practice.

On these considerations, it is my opinion, that, the law maritime, which I am to administer, will not sustain a claim

for wages, by the legal representatives of a seaman, beyond the time of his death, when the engagement was by the month.

In the present case, advances were made exceeding the amount of wages, due at the time of the seaman's death. I therefore decree, that the administrator take nothing by his libel.

It is understood that no costs are claimed.

(Signed) JOHN DAVIS,
Dist. Judge, Massts. Dist.

LITERARY INTELLIGENCE.

ON Wednesday, 1st of November next, will be published, in One Volume, Octavo, THE PRACTICE AND JURISDICTION OF THE COURT OF ADMIRALTY: *In Three Parts.* 1st. An Historical Examination of the Civil Jurisdiction of the Court of Admiralty. 2nd. A Translation of Clerke's Praxis, with Notes on the Jurisdiction and Practice of the District Courts. 3d. A Collection of Precedents.

PARET RATIONE MODOQUE.

By John. E. Hall.

Preparing for the Press by the same author, a translation of the CONSOLATO DEL MARE, with notes.

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NO. VIII.

IL CONSOLATO DEL MARE.

THE JUDICIAL ORDER OF PROCEEDINGS

BEFORE THE

CONSULAR COURT.

TRANSLATED FOR THIS JOURNAL.

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[Before we saw the wish expressed by Judge Davis, p. 374 *ante*, we had formed the intention of enriching our *Bibliotheca legum*, with a translation of the venerable code of maritime laws which has long been known by the title of the *Consolato del Mare*. The part which we now present to our readers relates merely to the practice or forms of proceeding of the consular or commercial Courts in ancient times. It is a kind of introduction to the work, and by some commentators is supposed to be no part of it. But it is incorporated with the best editions.

The origin of this work, which boasts the honour of forming the rule of decision in commercial matters, for almost all Europe,* from the earliest ages of jurisprudence, has been disputed with as much tenacity as the birth-place of Homer.

The editor of the Amsterdam edition, printed in Dutch and Italian, contends that it was not written in the age of St. Louis,

* Targa, cap. 96. p. 395. Lubeck p. 110.

but that nearly 200 years prior to that time, in 1075, it was read at Rome in the convent of St. John of Lateran, and there sworn to by the people. Emerigon, who has all the accuracy and deliberation of a German commentator adopts the same chronology.

But in what age it first appeared, or in what tongue it first dictated its lessons, it has ever been received with that deference which is due to the source of sound principles. Whether it were first written in the dialect of Catalonia, or the language of Italy, is of no intrinsic importance to us.

Judge Davis speaks of a recent translation into the French tongue, as if it were the first. But in this the learned Judge is probably mistaken. Emerigon speaks of one which was given to the publick in 1577 by M. François Meyssoni, an advocate of Marseilles, and reprinted in 1635. The recent translation, the editor is informed by a correspondent, is in two volumes; but the second comprizes the whole of the Consolato. The first is said to be "a mass of undigested learning which might have been reduced to a few pages."]

CHAPTER I.

Of the mode of choosing Consuls and Judges of Appeal every year.

EVERY year, on Christmas day, at the hour of Vespers, the good ship owners, masters and mariners, the whole, or a majority of them, meet together in council, at a place by them chosen and appointed, as they have been accustomed to do in the City of *Valencia*, and there by election and not by lot, they or a majority of them, choose two honest men, skilled in the art of navigation, to be their consuls, and another person of the same, and not of any other profession to be judge. And this latter person so chosen, is to be judge of Appeals, which Appeals are made and prosecuted by virtue of a privilege obtained from the king and his predecessors, which privilege is possessed by the good men belonging to the seafaring profession,

CHAPTER II.

Of the Oath taken by the Consuls.

On Christmas day, the said consuls swear before the Civil Tribunal of the said city, in the principal Church thereof, as has been accustomed in the said City of *Valencia*, that they will well and faithfully execute the said office of the Consulate, and that they will do justice to all men whatever be their rank or condition, preserving their fealty and loyalty to their prince or king.

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CHAPTER III.

How the Judge of Appeals is presented.

The festival of Christmas being over, the consuls together with some good men of the seafaring profession, present the said judge elect, to the governor and procurator of the kingdom of *Valencia*, or to his lieutenant, and he swears before him that he will well and faithfully behave in his said office. And he who is presented by the said consuls to the said Governor as Judge of Appeals, is, on his being thus presented, accepted by the governor or procurator as judge of the said appeals ; and thus, it is the custom to do, although the privilege expressly says that the said judge shall be annually elected by the king, or his procurator, but neither the king nor his procurator have exercised that right since the granting of the said privilege, and therefore the custom has been, and still continues, as above mentioned, and it is held valid.

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CHAPTER IV.

How the Consuls appoint a Register for themselves and for the Judge of Appeals.

The consuls appoint such a person as they think proper to be their register, and if he, who acted as such the preceding

year, appears sufficient to them, they confirm him in the said office for the year following, and afterwards the newly appointed consuls, if they are satisfied with him, confirm his appointment. And the said judge must make use in his registry, of the register so appointed by the said consuls, so that the proceedings before the said judge may be carried on in the same form as those before the said consuls. But the said consuls may, within the year, and at any time that they may think proper, remove the said register from their office, and give his place to any one that they may choose, which removal and dismission the said register cannot oppose.

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CHAPTER V.

Of the form of the seal of the Consuls.

The consuls have a seal for their court of a round shape, on which is an escutcheon, on two third parts of which are the king's arms, and on the other third part, certain waves of the sea. Round the said escutcheon is written, *Sigillum Consulatus Maris Valentiæ pro Domino Rege*, with the same seal the judge seals all necessary instruments, and it remains in the custody of the register of his court.

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CHAPTER VI.

Who may be Consuls, and who Judges.

Those who are consuls for one year, cannot be so the succeeding year, but other consuls are elected, and the judge is changed every year, but he may be re-elected the third year. And moreover, he, who has been consul, may be elected judge, and thus the judge may be elected consul for the succeeding year.

CHAPTER VII.

How the Consuls may substitute others in their place.

The two consuls together, or one of them, for cause of sickness, or business, or of being obliged to leave the city of Valencia, may substitute in their places whomsoever they shall think proper, provided they belong to the seafaring profession, and the judge may do the same.

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CHAPTER VIII.

Of the order of proceeding before the consuls.

When a libel is exhibited in writing before the consuls, respecting a matter within their cognizance, and which is to be determined according to the customs of the sea, they are to send by their messenger a copy of the said libel to the adverse party, and the adverse party is to give in his answer thereto within the time prescribed by the said messenger, by order of the consuls. The defendant, in his said answer, is to state the reasons of his defence, and if he has any cross demands, he is to insert the same in his said answer; to which reasons of defence and cross demand (if any be inserted) the original plaintiff is bound to reply, and also give the reasons of his defence (if he has any to make) against the said cross demand; to which reasons of defence, the original defendant who preferred the cross claim, is obliged to reply; and for the filing of those pleadings, the consuls are to fix terms, from three days to three days, more or less, as they shall think proper. The answers being given in, (and if the parties proceed in any other way, the proceedings are to be null and void) the parties are to take the oath of calumny and the oath to speak the truth, and make true answers to the mutual allegations of each party.

1. And in order to prove what shall be denied on either side, there shall be granted, if required, a probatory term to

the parties, the first term to be of ten days, and they may have four similar terms, but on making oath, that the fourth term is not demanded out of malice, nor for the sake of delay, and in case there should be witnesses to be produced who live at a distance, a convenient term shall be granted, in proportion to the distance of the place, where the party shall make oath that the witnesses live, and at every term the party is to have notice to be present to see the witnesses sworn which are to be produced. Otherwise they shall be sworn in his absence. These terms being expired, and publication passed at the request of the parties, the consuls will assign a day to them to hear sentence given, without its being necessary that the parties should renounce making any further allegations, and without the proceedings being null on that account, but before the publication of the said testimony or afterwards, either of the parties may produce writings, or publick instruments in their favour.

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CHAPTER IX.

Of challenging Witnesses.

After publication passed, neither party is permitted to allege reasons in writing against the witnesses who shall be admitted in the cause, nor is any challenging of witnesses permitted, either verbally or in writing. But if either party alleges by word of mouth that the said witnesses or some of them, are related to the party who produced them, or enemies of him against whom they are produced, or are persons notoriously of bad fame, these points remain to be determined by the consuls, who may inform their own consciences by taking advice of those who are well acquainted with the persons of the witnesses, their fame and condition.

CHAPTER X.

How sentence is given upon the demand in scriptis.

A day having been assigned by the consuls to the parties to hear sentence, the said consuls together with their register, go to the most honest and respectable merchants of the city, make them read the whole of the proceedings, and take upon them the advice of those good merchants, afterwards they do the same with the most respectable men of the seafaring profession, and take their advice. They may take in the first place the advice of the seafaring men, if it is most convenient to them. And if the opinions of the merchants and those of the seafaring men agree, they will pronounce sentence in the cause, and if they disagree, and the merchants will not come over to the opinion of the seafaring men, the consuls nevertheless give sentence agreeably to the advice of the latter, because the contracts are to be decided upon by their advice, and they are not bound (unless they please) to take the opinion of the merchants, it not being required by the privilege, but it has been their custom ever since so to do.

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CHAPTER XI.

Of appeals.

Whoever shall conceive himself aggrieved by the sentence of the consuls, may appeal within ten days from the publication of the same, and the said appeal is received, and remitted to the judge of appeals, together with the record of the proceedings that have been had before the consuls, in lieu of apostles or letters dismissory, in which instrument of appeal are to be alleged the errors or *gravamina*, by which the party appellant conceives himself to be aggrieved.

OPINION*

ON THE CASE OF THE

ALLUVION LAND OR BATTURE,

NEAR NEW-ORLEANS.

BY PETER S. DU PONCEAU, ESQ.

I HAVE read and considered with great attention, the opinion of Mr. P. Derbigny, on the subject of the claim of the United States to the alluvion land near New-Orleans, known under the denomination of the *Jesuits' Batture.* I have also read a printed pamphlet on the same side, entitled "*Examination of the Judgment rendered in the cause between Jean Gravier and the city of New-Orleans.*"

On the other side I have read a printed pamphlet, by Edward Livingston, Esquire, entitled "*Examination of the Title of the United States to the Land called the Batture.*" I have read also a variety of deeds, official papers, and other authentick documents relating to the subject, but not necessary to be here enumerated.

I have considered the whole, and investigated the subject with all the attention, care and industry that I am capable of, and am now proceeding to state the opinion which my researches have led me to form.

In order to come to a right understanding of this case, it must be premised, that Jean Gravier, of the city of New-Orleans is possessed of a decree of the Superior Court of the Orleans Territory, which is a Court of *dernier resort*

* Vid. No. 7. p. 358 *ante*.

and whose decisions are not subject either to appeal or revision, by which he is declared to be in *lawful possession* of the Batture or Alluvion in question *(a)* and quieted therein against the claims of the corporation of New-Orleans, who alone at that time had or claimed an adverse possession.

The said decree not only recognizes his right of possession, but also his title to the Alluvion in controversy as incident to an adjacent estate, the title to which was not even disputed by the corporation who contended against him. *(b)*

It must be premised also, as it has been stated to me, that the said decree was carried into full execution, and the party put into actual and full possession of the said Batture by the proper officers of the said Court, and continued in the said possession for several months, until he was disturbed by the effect of the measures which the Executive thought proper to take, and which were announced by the President in his message to Congress of the 7th of March last.

Those measures were taken, as the President states, to prevent, until a decision should take place, any change *in the state of things;* which I think must be understood to mean, *in the state of the property*, not in the relative state of the parties, already fixed by a competent authority and which could not be changed but by a superior judicial decree.

Under these circumstances, I conceive that the party

(a) "It is therefore ordered, adjudged and decreed, that the petitioner be quieted in his *lawful enjoyment* of the Batture or Alluvion described in his petition against the claims and pretensions of the defendants." [See the Judgment at length, post.

(b) "The title of Bertrand Gravier, the ancestor of the plaintiff, to the tract of land on which the Fauxbourg St. Mary is situated, has not been disputed, but it has been contended that this tract was bounded by the highway: The Court, however, are of opinion, that according to the evidence exhibited and the general usage of the country, this tract of land was bounded by the river Mississippi. From an examination of the authorities, the court are of opinion that according to the Civil and Spanish laws, the right of alluvion is incident to land which is bounded by a navigable river, and that these laws must form the rule of decision in the present case."

claiming under Jean Gravier, is still to be considered as the lawful *possessor* of the land in controversy, and that his title to the property, sanctioned, as it is, by the judgment of a Supreme Court of Judicature, is to stand good against all the world, *until a better is shown.*

If I am correct in this position, the question now to be decided will be considerably narrowed; for there will remain only to be considered whether the United States have *a better title* to the contested alluvion than that which has been solemnly adjudged to be in Jean Gravier.

I have thought it necessary to make these preliminary observations, because Mr. Derbigny in his opinion has not appeared to view the subject in the same light, but has argued as much from what he conceives to be the weakness of Mr. Gravier's title as from the strength of that which he endeavours to support, which I conceive to be contrary to all the rules which the law has wisely established for similar cases.

Then, as the claim of the United States appears only to rest on the prerogative which it is alleged they derive from the French kings to claim and have all alluvion lands, it seems that it will be sufficient for me to enquire into the grounds of that supposed prerogative, to examine whether it ever existed, and if it did exist, whether it has become a prerogative of the United States; nevertheless I will not confine myself to this single point, but I shall take and consider successively all the several grounds on which Mr. Derbigny has established his opinion in favour of the national claim.

Those grounds are five, and are stated by Mr. Derbigny himself in the following words:

1st.—Alluvion on navigable rivers belonged to the king of France.

2d.—The plantation bordering on the limits of the city of New-Orleans, was sold by the king of France in 1763, when the alluvion situated in front of the land was already in being.

3d.—Between the alluvion and the land sold, lay a royal road, the same that still exists and a levee, both which were then and have still remained publick property.

4th.—The alluvion in question has never ceased to be a royal property, the enjoyment of which the French and Spanish governments at all times left to the publick, and on which they constantly hindered private individuals from encroaching.

5th.—Neither Jean Gravier nor those from whom he derived his title, ever were in possession of the alluvion, and Bertrand Gravier himself, at the time of his settling a suburb in front of his plantation, declared that he had no claim to the alluvion.

I shall consider each of these positions separately.

FIRST POSITION OF MR. DERBIGNY.

.....

"*Alluvions on Navigable Rivers belonged to the King.*"

Before we enter upon this subject we must take a cursory view of the different laws by which France was governed before the late revolution.

In the first place, there were a great variety of customs, which, like the common law of England, were founded on and grew out of the feudal system. There were the customs of provinces, of lesser districts, and even of single towns, all or most of which, in ancient times, had been feudal sovereignties. I have counted seventy-five of those customs, and I believe there were several more. Like the common law, they remained an oral and unwritten tradition until the year 1453, when Charles the VII. by an edict which was carried into execution, ordered that they should all be committed to writing and reduced to a text. It is remarkable, that this was done about the same time when Littleton wrote his elec-

brated book of *Tenures*, which from its intrinsic merit, has by universal consent become as it were the text of the English customary law.

There were however, some parts of France, particularly in the south where lay the most ancient and most flourishing provinces of the Roman empire, in which there existed no such customs, except here and there in particular districts. Those provinces were governed by the Roman civil or imperial law, and were called on that account *Pays de droit ecrit*, or countries governed by the written law, as the civil law was called in contra-distinction to the customs, which, as has been observed, had been for a long while traditional.

In the *pays coutumiers*, or provinces where the customs prevailed, the lands were held by feudal tenure, and there the maxim prevailed, "*nulle terre sans seigneur*," no land without a feudal lord. In the other parts they continued to be held *allodially*, as they were under the Roman emperors, that is in full and absolute, property, and without any kind of feudal subjection. This specie of tenure was called in French by the expressive name of *franc-aleu*, that is to say, *free allodium*, or *free tenure*.

Paramount to these several codes were the edicts and ordinances of the successive sovereigns, duly registered in the courts of parliament, and whose authority extended all over the kingdom. These controuled the customs and the imperial law, as the acts of parliament in England controul the decisions of the common law, which, with respect to them, are considered as *lex sub graviori lege*.

But in the same manner that the common law of England, notwithstanding this theoretical arrangement, has often controuled the parliamentary statutes while pretending only to expound them, so the civil law in France in many instances controuled as well the provincial customs as the edicts of the sovereigns. As it was taught in all the universities of the kingdom, while a knowledge of the edicts and customs could only be acquired by private reading or professional practice, all the lawers throughout France, necessarily became civi-

lians, and the imperial code came to be considered as a supplementary law, which from the acknowledged equity of its principles, was obligatory in all cases for which the customs and royal edicts had not expressly provided, and as the medium through which those customs and edicts in all doubtful cases were expounded and explained. The civil law, in short, was the common law of the land, and is frequently called *le droit commun*, in the works of the most eminent writers.

Such were the laws by which the kingdom of France was governed, and the manner in which they operated. I shall speak in another place of the legislative system of the colonies. And now considering the subject merely as it related to France proper, I shall examine how the law stood there with respect to the point in controversy.

On the subject of alluvions and other accessions of land by the receding of waters, the Roman law is very full, systematical and clear. It is to be found in the 20th, 21st, 22d, and 23d sections of the second book of the first title of the Institutes.

1. The 20th section *de alluvione*, defines *alluvion* land to be that which is produced by the imperceptible decrease of waters. It declares it to be by the law of nations, *jure gentium*, the property of the owner of the adjacent ground.

2. The 21st § *de vi fluminus*, relates to land which by the sudden violence or impetuosity of the waters of a river is detached from one estate and joined to another. That is declared still to belong to the owner of the estate from which it was severed.

3. The 22d § *de insulis*, relates to islands rising in the sea or in a river, and is not properly connected with our present purpose.

4. The 23d § *de alveo*, relates to the land which is formed by a river abandoning it's bed entirely, and running into a new channel. Such land is declared to belong to the owners of the adjacent estates.

We subjoin the text of the two first and of the last of the above four sections, taken from Harris's translation of the Institutes, page 7. *(c)*

These principles previous to the making of the edicts which will be presently mentioned were considered as the law throughout France, except in those places where the customs had expressly directed it otherwise.

On this as on many other points, the customs were various. Some gave alluvions to the king, others to the feudal lords, some, as for instance the custom of Normandy, adopted the rules of the civil law, while others were entirely silent on the subject, and among these was the custom of Paris, which as we shall see by and by, was the law of the colonies. The chasm was therefore supplied by the civil law, and hence we find that all the commentators on the custom, at least all that I have been able to see, lay down its principles on the subject of alluvions, as being law under the custom. Among those we distinguish Monsieur Dumoulin whose name in France is equal in veneration to that of Lord Coke in England, and who in 1539 published an excellent commentary

(c) § 20. And further—That ground which a river hath added to your estate by alluvion (i. e. by an imperceptible increase) is properly acquired by you according to the law of nations. And that is said to be added by *alluvion* which is added in a manner which renders it impossible to judge how much ground is added in the space of each moment of time.

§ 21. But, if the impetuosity of a river should sever any part of your estate, and adjoin it to that of your neighbour, it is certain that such part would still continue yours; but, if it should remain for a long time, joined to the estate of your neighbour, and the trees which accompanied it, shall have taken root in his ground, such trees seem from the time of their taking root, to be gained and acquired to his estate.

§ 23. If a river, entirely forsaking its natural channel, hath began to flow elsewhere, the first channel appertains to those who possess the land, close to the banks of it in proportion to the breadth of each man's estate next to such banks: and the new channel partakes of the nature of the river and becomes publick. And if, after some time, the river shall return to its former channel, the new channel commences to be the property of those who possess the lands contiguous to the banks of it.

on the feudal matters of the custom of Paris, and Monsieur Claude de Ferriere, professor of law in the university of Paris, who more than a century afterwards, wrote another much esteemed commentary on the said customs. See the quotations in Mr. Livingston's opinion, ante page 331.

Such was the law understood to be in France until Louis XIV. issued those three edicts of 1683, 1693, and 1710, which Mr. Derbigny has referred to in his opinion. Indeed he issued four, all nearly of the same tenour; the first of them which Mr. Derbigny takes no notice of, was made in 1668, and is mentioned in 4th Denizart, 295, No. 8, under the word *riviere*. Four successive laws to the same effect, in the short period of forty-two years, show how unpopular those edicts were and how difficult it was to carry them into execution, even in the reign of the all powerful Louis. Denizart informs us, vol. 4, page 295, No. 9, that they were modified with regard to Brittany and Languedoc, on the remonstrances of the states of those provinces, the only ones in France who enjoyed a popular representation. They were in fact, merely fiscal edicts, the object of which was to provide pecuniary resources for the most arbitrary and the most extravagant king that France ever had, and no such edict can be found at any period antecedent or subsequent to the time when those were made. Mr. Derbigny has stated very correctly the preamble and a part of the enacting clause of the edict of 1693, on which he relies as being worded the most strongly in his favour, but he has omitted the concluding part which shows in the clearest manner the intent and object for which the law was made. I shall state the whole in a few words.

The king, after declaring himself to be, by the law of the realm, (a law which had never been heard of before) the the lawful owner of the bed of navigable rivers, and consequently of all islands, mills, ferries, &c. *atterissements and accroissements* formed by the said rivers, declares that all the holders of *atterissements*, *accroissements*, ALLUVIONS and islands, shall be quieted in their possessions, that is to say,

those whose title is anterior to 1566, on paying into the treasury *one year* and all others *two years* of their income. *(d)*

It is plain then that the object of these edicts was not so much to settle or declare the law, as to supply the necessities of an extravagant king, by extorting a composition from the *bona fide* holders of property, which the existing law, notwithstanding what is said in the preambles of the edicts, clearly warranted to them. Hence they did not receive the willing assent of the nation; but were, as I shall presently show, the object of a constant struggle between the sovereign, or rather between the *fiscus* or treasury and the people.

In other respects also, those edicts were most oppressive and arbitrary, and such as any other sovereign than Louis XIV. would hardly have ventured upon. For they were a direct violation of a well settled principle in the French law, to wit, that a possession of thirty years amounts to a prescription, and is a bar against those claims of the crown, which are called *casual rights*, that is to say, those rights which accrue to the king by accident or chance, such as escheats and the like, unless before the expiration of the thirty years they have been annexed to the domain with the usual formalities. "Among us," says Ferriere, the son of the author before mentioned, and who, like him, was professor of law in the university of Paris, "the estates of the domain which are incorporated with the crown, are not subject to proscription. But those which are not so incorporated, may be prescribed for by thirty years possession. IT IS THE SAME WITH CASUAL RIGHTS OR PROFITS." *(e)* But the king in that edict of 1693, on which M. Derbigny relies, does not appear to have respected any possession, however ancient, nor any

(d) Ceux qui ont rapporté des titres de propriété et possession avant le 1er. Avril, 1566. en payant *une annee* de revenu—ceux sans titre ni possession antérieure au 1er. Avril, 1566. en payant *deux annees* de revenu. 4 Deniz. 285, No. 10. *verbo* riviere.

(e) Parmi nous, les biens du domaine incorporés à la couronne sont imprescriptibles. Mais ceux qui n'y sont pas incorporés se prescrivent par trente ans. *Item, les droits et profits casuels.* 2. Ferriere, on the Institutes, 184.

title, however solemn; for even those who could show a title or a possession anterior to 1566, more than one hundred years before the publication of the first edict, no matter how far back such title or possession went, were obliged to compound with one year of their income.

Such are the principal features of these royal acts, on which the United States are called upon to found a claim to an estate which has been solemnly adjudged to a citizen by a decree of a competent court. Acts indeed of the most tyrannical kind; and from which the mind of a free American shrinks with disgust.

The lawyers of France saw them in their proper light, and although they could not get rid of them altogether, as the king's edicts had, undoubtedly, in France, the force and effect of laws, yet, they gave them as strict a construction as they could possibly admit of.

It is to be observed that the word alluvion is not to be found in any of those edicts, except in that of 1693, nor even in that is it used in that part of the act in which the king states what is the law of the realm. The only words used are *cre'ment* or *accroissement* and *atterissement*, which being of a vague and uncertain meaning afford sufficient room for legal construction. Those were defined to mean, not *alluvions* properly so called, but those other species of *accessions* which are the subject of the 21st and 23d sections of Justinian's Institutes above mentioned. *Accroissement* in the sense of the edicts, was defined to be land which is suddenly transported from one place to another by the violence of the waters of a river; and *atterissement* the land which is left uncovered when a river suddenly changes its bed altogether, and opens to itself an entire new channel.

"There is then" says the younger Ferriere, in his commentaries on the 21st § of the Institutes, *de vi fluminis*, "a difference between *an alluvion* and *an accroissement*, made by the violence of the waters." After explaining that difference and the reason thereof, he proceeds thus: "By our French law, when those *accroissements* which have been

made suddenly are considerable, *it is pretended* that they must belong to the king, as a kind of waif or direlict, *which appears conformable* to the royal ordinances by which the islands and *atterissements* which are found in navigable rivers belong to the king." *(f)*

How unpalatable these edicts were to the French Jurists appears sufficiently from the language of this writer, who states the king's claim to *accroissements*, in their narrow legal sense as a mere pretension of the government, which he however reluctantly acknowledges to be conformable to the royal ordinances.

Commenting on the 23d § of the Institutes *de alveo fluminis*, this author proceeds to define the word *atterissement*.

"We call in our French law *atterissement* the *channel and bed* which a river has quitted. These belong to the king," &c. *(g)* In his dictionary of jurisprudence, verbo *atterissement*, he says, *the channel and bed which a river has suddenly quitted*—(tout d'un coup abandonné.) And it must be observed that he refers to and is commenting on a text of the Roman law, which relates only to the case of a river *changing its bed altogether*. Therefore there can be no doubt about his meaning.

But when he comes to speak of alluvions properly so called, when commenting on the 20th § of the Institutes, by which it will be remembered they are declared to belong to the owners of the adjacent soil, his language is as clear and full as it is short, and he states the French law, that is to say,

(f) Il y a donc de la difference entre *l'alluvion* et L'ACCROISSEMENT fait par la violence des eaux. Par notre droit Français quand ces accroissemens qui se sont faits tout à coup sont considérables, on pretend qu'ils doivent appartenir au roi comme un espèce d'epave—ce qui parait conforme aux ordonnances royaux, par lesquels les isles et *atterissemens* qui se forment dans les grands fleuves appartiennent au roi. 2 Ferriere on the Institutes, 52.

(g) Droit Francais—Nous appellons *atterissement* le canal et le lit qui la riviere a d'un coup quitté. 2 Ferriere on the Institutes, 52.

the general practical law of the land, the *Jus Gallicum*, as contra-distinguished from the Roman law on which he is commenting, and from particular customs, in these few words: "FRENCH LAW—The disposition of this section is observed among us." *(h)*

The expression of this professor is peculiarly remarkable, because he not only states his opinion of what the law ought to be, but his knowledge of *what it is in practice*. "THE DISPOSITION OF THIS ARTICLE IS OBSERVED AMONG US."

Such then, if we are to credit this eminent professor, was not only the opinion of the learned in France, at the time when he wrote these excellent commentaries, which he published in the year 1768, just before the possession of Louisiana was delivered to the king of Spain, but the doctrine admitted and recognised by courts of justice. *Atterissement* and *accroissement* were given to the king, to satisfy the words of the edicts, but *alluvion* properly so called, was held to belong to the subject.

On this point, that alluvions proper, are not included within the legal meaning of the edict, as accessions belonging to the sovereign, but remain as they were at the civil law, except in districts where the customs had expressly provided otherwise, all the French authors of respectability whose works I have had an opportunity to peruse (one only excepted, Mr. Pothier, of whom I shall speak presently) fully and most unequivocally agree. Were I disposed to swell this opinion with names and quotations it might easily be done; but besides Ferriere already quoted, I need only mention Denizart, Renusson, Guyot, Henrys, Argentré and others whose works are quoted or referred to in Mr. Livingston's pamphlet, and to whose respectable names many others might be added of equal authority. The same doctrine is laid down in all the abridgements and dictionaries of the French law, in that immense work, the Repertory, in De-

(h) Droit Francais—La disposition de cet ϛ est observèe parmi nous. 2 Ferriere on the Institutes, 45.

nizart's collections, in Ferriere's dictionary, and even in the Encyclopædia, which has been brought forward as an authority by Mr. Derbigny himself.

Let us now test this construction of the French jurists by the edicts themselves. None of them, except one, that of 1693, any where makes use of the word *alluvion*, a technical term of the common law of the land, which for ages had been known and used, and would have most obviously occurred to the framers of the edicts, had it been their intention to include it within them. There was no legal necessity therefore to force it by construction into statutes, which from their nature and objects were not such as to require to be liberally construed.

But it is said, the word *alluvion* is expressly mentioned in the edict of 1693, and Mr. Derbigny has chosen it out of the four to support his argument.—It would have been more fair and perhaps more correct to have chosen the last of all, that of 1710, as the best and surest test of the intention of the Legislator. But we are willing to take the edict of 1693 as if it stood alone, and to examine in what manner the word *alluvion* is introduced into it.

It will be recollected that there are two distinct parts in this edict, the one by which it declares what things or rights the king is entitled to by the law of the land, in which the word *alluvion* is not contained, the other by which he calls on the holders of certain descriptions of property to come forward and compound with his treasury. Then reducing this edict to the most simple terms, it will, in a few words, read thus: "I," (the king) "am the lawful owner of all *accroissements and atterissements*. I am willing to quiet in their possessions such holders of *accroissements*, *atterissements and* ALLUVIONS, as shall come forward and compound with me."

Now, would it not be a forced construction to insert the word *alluvions* in the first member of this sentence; and make the king say, "*I am the lawful owner of all alluvions*," when it appears most clearly that he has avoided saying it?

Nor is it necessary to do it, in order to give effect to the last member of the sentence, for the king might very justly and very legally compound with the holders of *certain alluvions* without claiming to be the *lawful owner of all*: for instance, in those provinces where the customs declared alluvions to be the property of the sovereign. There can be no doubt but that the word *alluvion* was inserted in the second branch of the edict to meet similar cases, and that it was left out of the first, that it might not be applied to all cases of alluvion indiscriminately.

But when we consider that the framers of those edicts did not venture to make use of the word *alluvion* in the two first of those ordinances, that in the third they threw it in in this loose manner, and in the fourth again left it out; we must conclude that the sense of the nation on this subject was well understood, and that great and powerful as he was, Louis XIV. thought that he had gone far enough in asserting his right to *accroissements* and atterissements, and was content to leave his subjects in the enjoyment of their favourite right *to alluvions*.

I do not mean to say that in process of time, the officers of the treasury did not endeavour by a construction of the edicts similar to the one now attempted, to assert and enforce a claim in the sovereign to alluvions. The contrary fact is too well known. From time to time claims of that description were asserted, in some instances were submitted to and in others resisted with various success. This strug gle continued till some years before the revolution, when a celebrated case brought the point before a court of supreme judicature, by whom the controversy was solemnly decided in favour of the subject. When the Napoleon code, which has explicitly adopted the rules of the Roman law on this subject, was laid before the legislative body of France, M. Portalis, councillor of state, addressed them in a speech, in which he took a review of what had taken place in that country concerning the question of alluvions. An extract from his speech will throw considerable light upon this subject.

"This law," (the second title of the second book of the civil code) "*puts an end to the great question of alluvions.* It decides according to the principles of the Roman law. The principles of feudality had involved this matter in obscurity, it had been *pretended* that alluvions, formed by navigable rivers, belonged to the sovereign, and those formed by rivers not navigable to the feudal lords. The owners of adjacent estates were put aside by most of the customs."

"In the provinces governed by the Roman law, those owners had however maintained their rights, but it was attempted to despoil them thereof a few years before the revolution; the solemn reclamations of the late Parliament of Bordeaux on this subject are well known: that body repelled with as much courage as learning the attempts of the treasury, and the ambitious intrigues of some courtiers, to whom the treasury lent its name."

"It was SETTLED at that period, that alluvions must belong to the riparious owner, according to this natural maxim, that the profit belongs to him who is exposed to suffer the damage, with which riparious property is threatened, more than any other.

"The feudal system has disappeared; it can therefore no longer present an obstacle to the rights of the riparious owners." *(i)*

(i) "Le projet de la loi termine la grande question des alluvions, et decidé conformement ou droit Romain que l'alluvion, &c.

"Les principes de la féodalité avaient obscurci cette matiére; on avaite eté jusqu'à pretendre que les alluvions formées par les fleuves et riviéres appartenaient au Prince, lorsqu'il s'agissait d'une riviére ou d'un fleuve navigable, ou au seigneur haut justicier, lorsqu'il s'agissait d'une riviére ou d'un fleuve non navigable. Les propriétaires riverains étaient entiérement écartes par la plupart des coutumes.

"Dans les pays du droit écrit, ces propriétaires s'étaient pourtant maintenus dans leurs drois, mais on voulut les en dépouiller peu d'années avant la révolution; et l'on connait à cet égard des réclamations solemnelles de l'ancien parlement de Bourdeaux, qui repoussa avec autant de lumiéres que de courage les entreprises du fisc et les intrigues ambitieuses de quelques courtisans dont le fisc n'était que le prête nom.

If this statement be correct, what can now signify the opinion of M. Pothier, on which M. Derbigny so much relies. M. Pothier is certainly a writer of great eminence; his opinions are entitled to a considerable weight, and he lays it down in the most unqualified manner, that alluvions in France belonged to the king. But amidst such a struggle between the crown and the subject, as has been shown to have existed, is it not naturally to be expected that some writer will be found to support the claim of royal prerogative? And if that writer should stand alone, amidst an host of learned jurists, on what principle is his single opinion to prevail?

It may be moreover observed, that M. Pothier resided at Orleans, in a district governed by a particular custom, which I have not now before me, but which possibly was one of that greatest number, which entirely excluded the riparious proprietor. If by the custom of Orleans, alluvions were vested in the sovereign, a natural prejudice in favour of his own local law, may have induced M. Pothier to extend its principles on the subject of alluvions to the whole kingdom. Thus a M. *Bourjon* quoted by *Denizart*, maintained the opinion that alluvions belonged to the lords of manors, and so probably it was by the custom of the country in which he lived. But, says *Denizart*, neither M. *Bourjon's* opinion, nor that of the authors which he quotes are *followed in practice*. See ante page 330.

But there must be an end to every discussion on this subject, since the law of France has been settled in this particular by the solemn decision of the parliament of Bordeaux, which M. Portalis mentions, and, as I am informed, by the

"Il fut établi à cette époque, que les alluvions devaient appartenir au propriétaire riverain, par cette maxime naturelle que le profit apartient à celui qui est exposé à souffrir le dommage, dont les propriétés riveraines sont menacées plus qu'aucune autre.

"De système féodal a disparu, conséquemment il ne peut plus faire obstacle au droit des riverains." *3me. Code Civil avec les Discours, &c.* 49.

Parliament of Paris, to whom the case was referred for revision. And although France at that time was no longer in possession of Louisiana, yet on the subject of a construction of a French law, the solemn opinion of a supreme bench of French judges, is the best evidence that can be obtained, and the United States would hardly claim rights under a French edict which the French courts, construing the same edict, denied their own sovereign to possess.

I now proceed to M. Derbigny's second position.

SECOND POSITION OF MR. DERBIGNY.

.....

The Plantation bordering on the limits of the city of New-Orleans, was sold by the king of France in 1763, *when the alluvion situate in front of the land was already in being.*

The testimonial proofs of this fact, says Mr. Derbigny, are such as to leave no doubt. I have not seen nor heard the proofs on which M. Derbigny relies, but however respectable his witnesses may be, and however pointedly they may speak, they are at least contradicted by the testimony of Mr. *Laveau Trudeau*, who, I understand was surveyor general of the province of Louisiana under the king of Spain, and is now recorder of the city of New-Orleans. He says, see ante page 352, "*that he recollects that at the time of the sale of the Jesuit's property* (which was in that very year 1763) *vessels came to the levee opposite Madame Delor's, and that there was then* NO BATTURE *from thence to the city.*"

On this point, then, taking together *Mr. Livingston's* and Mr. *Derbigny's* statements, it appears, not that the proof is perfectly clear on either side, but that there is contradictory testimony, which it is not my province to reconcile.

But I am willing, for the sake of argument, to take the fact for granted that there existed a batture or alluvion in the year 1763. The question then only is what inference is to be drawn from it?

I take M. Derbigny's inference to be, though rather obscurely expressed, that if that batture or alluvion existed in the year 1763, while the king of France was in possession of Louisiana, his title to it became vested under the edicts above mentioned. *(k)*

There can be no doubt that if there existed an alluvion near New-Orleans, in the year 1763, and if the king of France was entitled by law to all alluvions *there*, that his title was vested from the moment that an alluvion came to exist, liable, however, to be defeated, as we have already shown, by an adverse possession of thirty years, unless within that time the property should be annexed to the domains of the crown by a judicial proceeding in nature of our *inquest of office*.

But Mr. Derbigny takes it here for granted that his first proposition is incontestible, the contrary of which I hope I have sufficiently shown. And were it even otherwise, I think it was not sufficient for Mr. Derbigny to have shown that the king was entitled to the alluvions of navigable rivers in *France*, he ought to have proved also that he had a right to them in *Louisiana*. For because a certain law may exist in the mother country, it does not necessarily follow that it is in force in the colonies or in a particular colony. Many of the statutes of Great Britain have never been considered as in force here, merely because they were not suited to our colonial situation. "It has been held," says Blackstone, "that if an uninhabited country be discovered and planted

(k) Mr. Derbigny's words are: "Therefore considering that batture as an alluvion formed on a navigable river, without reference to any other circumstance, we may apply to it the expressions of the royal edicts above cited, and the authority of Pothier, to establish that alluvion or accretion belonged to the king of France."

by English subjects, all the English laws then in being, which are the birth right of every subject, are immediately there in force. But this must be understood with many and very great restrictions. Such colonists carry with them only so much of English law as is applicable to their own situation, and the condition of an infant colony; such for instance as the general rules of inheritance and of protection from personal injuries." 1 Blacks. Com. 107.

This principle is very reasonable; it is founded on the plain dictates of common sense and natural justice. And as Mr. Derbigny will not deny that the French are a sensible and intelligent nation, he must also presume that they have not excluded common sense from their colonial legislation.

The custom of Paris, it is well known, is the general law of the French colonies. But it does not follow that every part of that custom is actually in force there; those parts which are inapplicable to the situation of each colony necessarily lose their power. Mr. Moreau de St. Mery tells us so expressly. He collected before the late revolution all the law of St. Domingo in six quarto volumes, and when he comes to the custom of Paris, he tells his readers that as it is easy to be procured with excellent commentaries, he thinks it needless to insert it at large; but, continues he, *I shall speak elsewhere of the dispositions of that custom, which are inapplicable to the colonies.* (l)

So the general laws and ordinances of the kingdom of France are also the law of the French colonies, but this is, as Blackstone says, to be understood "*with many and very great restrictions.*" The same reason which applies this principle to the custom of Paris, will apply it likewise to the ordinances of the kings; this is too clear to need illustration.

But it will perhaps be expected that we should prove the negative proposition that the edicts in question were not in

(l) "Nous parlerons ailleurs des dispositions de cette coutume, qui sont inapplicables aux colonies." 1 St. Mery, 11.

force in the French colonies. It is always a difficult task to prove a negative; we shall however attempt it.

1st—It is a well known fact that the feudel system was not known nor exercised in any of the French colonies except Canada. Those parts of the custom of Paris which M. de St. Mery tells us were inapplicable to the situation of the West-India colonies, were undoubtedly those parts which were connected with feudality, though as that gentleman never completed the original plan of his work, he has not explained himself in this particular. In Louisiana every body knows that feudality never was established. "There are," says the author of the communications which the President laid before congress with his message of the 21st of October 1803, "there are (in Louisiana) *no feudal rights nor noblesse.*" President's mess. p. 30.

Now if, as Mr. Portalis tells us, the pretensions of Louis XIV. to alluvions were feudal claims or rights, and if no feudal rights ever existed in Louisiana, it follows, in my opinion that claims or rights of that description were excluded.

"By the law of my kingdom," says Louis XIV. "I am entitled to such rights;" that is, as Mr. Portalis explains it, by the feudal law, which is the law of my kingdom: but if the feudal law was not the law of Louisiana, the king could claim no such rights there.

2d—M. Moreau de St. Mery has inserted in his collection, which I have already mentioned, not only the laws and ordinances peculiarly relating to the colony of St. Domingo, but the edicts and general ordinances of France, which at the time when he wrote (after Canada had ceased to belong to that kingdom) were considered as being in force in the French colonies, generally, beginning with the year 1550 (long before Louisiana or St. Domingo began to be settled by the French) down to the year 1785. But in that extensive collection no mention is made, and no trace whatever is found of any of the edicts in question, and they would undoubtedly have been inserted in the work, had they been considered as a part of the law of the colonies.

3d—When Louis XV. or rather the Regent in his name, in 1717, granted Louisiana to the *Compagnie d'Occident*, he gave it to them (art. 5) in full property and dominion *(en toute propriete, seigneurie et justice)* not reserving to himself ANY RIGHTS OR DUTIES *(aucuns droits ni devoirs)* except fidelity and liege homage, which are the duties that every subject owes to his sovereign. The company kept it until 1731, when they gave it back to the king—1 Valin, 408. During that period, at least, he enjoyed no feudal rights whatever in that colony, and the edicts in question could not be in force there.

4th—By the 8th article of the same charter, Louis XV. authorised the West-India company, to grant the lands in Louisiana in such manner as they should think proper, even to be held in *franc-aleu* or *allodium (m)* that is, as Blackstone defines it, "*by a tenure wholly independent, and held of no superior at all.*" 2 Blacks. Com. 47. "A kind of tenure," says the same author, "which is property in the highest degree, and of which the owner is said to be seized *absolutely in his own demesne.*" Ibid 105. "A tenure which existed in the Roman provinces before the feudal system was introduced there." Ibid 47. And lastly, "A tenure not known in England, because all lands there are held mediately or immediately of the king." Ibid 60, 105. *(n)* The company held the province under this charter from 1717 to 1731, a period of fourteen years, and I believe it was held before that on the same terms by former grantees. During that time they must have granted a great proportion of the lands of the province, particularly on the banks of the Mississippi, where the settlements were first made, and it does not appear that any of the lands which they sold or gave

(m) Pourvu ladite compagnie aliéner les terres de se concession ; même les accorder en *franc-aleu*, sans justice ni seigneurie. West-India Comp. Charter, art. 8.

(n) This allodial property no subject in England has, it being a received and now undeniable principle in the law, that all the lands in England are held mediately or immediately of the king.

away, were granted otherwise than *allodially*, as *those* which they granted *in one thousand seven hundred and twenty six* to the Jesuits, under which title we are seized, confessedly were. *(o)* If so, the very terms of all the ancient grants under which the inhabitants hold, excluded *feudal rights* of every kind, and consequently excluded the *feudal right of alluvion*, if such existed. It will be recollected that Mr. Portalis expressly states that the inhabitants of those parts of France which were governed by the Roman law, and where lands of course were held *in allodium* or *franc-aleu*, maintained their rights to alluvions against the attempts of the officers of the treasury to enforce the king's pretensions among them. Because undoubtedly it was considered that it is the very nature and essence of *allodium*, not to be subject to any feudal rights or claims of any description.

5th—It does not appear that the edicts in question, or any of them, were ever enforced or attempted to be enforced in Louisiana, or that either the French or Spanish governments ever claimed a right to have the alluvions of the Mississippi. I leave the case of this *batture* out of the question, because I shall speak of it in its proper place. But it does not appear that any other person, except John Gravier, or those claiming under him were ever molested or *disturbed in the enjoyment of an alluvion.*

6th—No reservation of a right of alluvion appears to have been made in any of the French grants, although it is well known that they are very particular in all their writings, and particularly in the grants of their government, in expressing whatever they wish to be reserved. The St. Domingo grants that I have seen are full of conditions and reservations. Mr. Derbigny himself states under his third head, ante page 301, that the royal grants of land in Louisiana were drawn up in the same careful manner; "*those grants*" says he, "*expressed that the grantee was to fulfil* CERTAIN CONDI-

(o) See the proceedings on the sale of the Jesuit's land, ante page 343.

TIONS, *and* AMONGST OTHERS, *that of making a publick road on his land.*" It is probable that the alluvion right would have been expressly reserved had it existed.

If I have sufficiently proved that the edicts in question were no part of the law of Louisiana, it is of no consequence whatever whether there was or not an alluvion in the year 1763. But the fact does not appear proved, or if proved, is contradicted by other testimony.

Unless, however, it is clearly proved that there existed a batture or alluvion at that period, or at least at the time when Spain took possession of the country and promulgated the Spanish laws, which was in the year 1769, all the arguments drawn from the French law must fall to the ground, and the Spanish alone becomes the rule of decision, and as it is admitted that by the Spanish law, there is no such right of alluvion in the sovereign as is now claimed, there is an end to the whole controversy.

But I shall proceed to consider the case on the supposition that a batture existed, and that the law of Louisiana as it was previous to 1769 is to be the rule of decision.

THIRD POSITION OF MR. DERBIGNY.

.....

"*That between the Alluvion and the Land lay a Royal Road, the same that still exists, and a Levee, both of which were then, and have still remained publick property.*"

Before I proceed to observe on this third position, I must take notice of an authority which Mr. Derbigny has referred to, under the first head of his argument, the examination of which will, I think, properly introduce the discussion of the point now before us.

Mr. Derbigny presuming that M. Denizart was the only French author whose opinion was contrary to that of M. Pothier, on the subject of the right to alluvions, and not attending to the host of respectable writers, all of whom have maintained the same ground with M. Denizart, while M. Pothier appears to have stood alone on his side of the question; thought that he could reconcile the opposite opinions of these two writers by a loose dictum of M. Lerasle, one of the compilers of the French encyclopædia.

This M. Lerasle, of whom nothing is known but that he was hired by the booksellers to compile the legal section of the new encyclopædia, and who, of course, is a very unfit person to reconcile two such men as M. Ferriere and M. Pothier, merely says: "That alluvions by the law of France, belong to the owners of the adjacent estates, when such estates are immediately bounded by the river, but if they have for their boundary an intervening causeway or road, then the alluvions belong to the king."

In the first place it cannot be denied that if an estate be not immediately bounded by a river, but by some thing else, lying between the estate and the river, whether that something be a causeway, a road, or any other modification of real property, the alluvions cannot belong to the owner of the estate, because it is not adjacent to the river, and he is not then what the law calls a *riparious proprietor*.

Secondly—If the intervening causeway or road is publick property and belongs to the sovereign, it is clear also that the sovereign is alone entitled to the alluvions, not by virtue of any edict or prerogative, but simply because his property, the causeway or road, lies contiguous to the river, and therefore he is in fact the *riparious owner*. Thus on the banks of the Loire, in France, there is a royal levee or embankment, which serves also as a publick road. The soil on which the levee is made belongs to the sovereign: it was raised and is kept in repair at the publick expense. Those therefore whose estates lie contiguous to it have no right to claim the alluvions of the river, from which their property

is separated by that fine monument of human industry. But if on the contrary, a man possesses property lying on the banks of a river, under the obligation of keeping a publick road open as near as possible to the water side, such obligation does not take away from him his right of property in the soil through which the road is made to pass, it is only a *charge* or *servitude* upon his estate, and however the publick may have a right to the use of the road, the property can never be said to be out of him. Thus by the French ordinance of 1669, the owners of lands bordering on navigable rivers, are obliged to leave open along the banks, the width of twenty-four feet at least, for a royal road and draught of horses, and they are forbidden to plant trees or fence in their property nearer to the bank than thirty feet on the side on which the boats are hauled or drawn, and ten feet on the other side, under the penalty of a fine of 5000 livres, and confiscation of the trees or inclosures. *(p)*

It is clear that this law considers the property of the soil of the road to be in the owner of the riparious estate, otherwise, it would not have directed in case of contravention, the *confiscation of the trees* which should be planted on the said road. Trees while in the ground, being considered in France as well as in England and America, as immovable or real property, and as a part of the soil in which they grow. And again, if the obligation to make such a road had been considered as vesting the soil of it in the king or government, there would have been an end in France to the question concerning *alluvions*, because as there must be such a road all along the banks on each side of every navigable river, the property of the soil of those roads being in the king, the

(p) "Les propriétaires des héritages aboutissants aux rivières navigables, doivent de long des bords vingt-quatre pieds de place au moins en largeur pour chemin royal et trait de chevaux, sans qu'ils puissent planter arbres ni clôture ou haye plus près que trente pieds du côté où les bateaux se tirent, et dix pieds de l'autre bord à peine de 5000 livres d'amende, confiscation des arbres, &c. C'est la disposition de l'article 7, du titre 28 de l'ordonnance de 1669." 4 Deniz. 296, No. 18 *verbo* Rivière.

alluvions would have followed of course as there would not have been in France any riparious owner but the monarch himself.

Mr. Derbigny has been well aware of this distinction, for he does not rest his argument on the mere fact of there being a royal road and levee, but he adds that the said road and levee *were and continued to be publick property*. Neither does he pretend that this property was vested in the sovereign by virtue of a general law applying to every estate bordering on the Mississippi, nor by virtue of a general clause inserted in all the patents for similar estates, but by virtue of what he conceives to be an implied reservation in the deed which was made of the Jesuit's land to the person or persons through whom the Graviers became seized of the property. This is what we are going to consider.

In the first place it is admitted by Mr. Derbigny, that there was in Louisiana, probably from the first settlement of the colony, either a law or an usage, similar in substance or in effect to the French edict of 1669 above mentioned, by which the proprietors on the river side, were obliged to open a publick road near the river, and that *that* obligation was expressed as a condition in all the grants of land bordering on the Mississippi. In addition to that, each land holder was bound to raise an embankment or levee to prevent inundations, and to keep both the levee and the road in repair. Whether these obligations were imposed by custom or by a positive written law, is indifferent, because such a general and ancient custom must have been equally binding on the inhabitants as a statute or ordinance would have been.

It is probable that the idea was taken from the French ordinance, or perhaps, that the ordinance itself was extended in practice to the colony of Louisiana, with such modifications as were considered to be suited to the localities.

However this may be, nothing can be clearer than that the king of France did not reserve to himself the soil of the road, which the proprietors of land on the Mississippi were obliged to open and keep in repair on their estates. The

very circumstances of their being obliged to repair the road as well as the levee or bank, is a proof that the soil was considered as their property, and it is in proof from Mr. Derbigny's own acknowledgment. See ante page 301. that the holders of land would sometimes stop up the old road and open a new one, "for," says he "*provided there were a road convenient to the river the grantee fulfilled his promise.*" The original grants therefore contained only a promise or covenant on the part of the grantees that a road should be kept open near the water on the premises, not a reservation by the king of any part of the soil for that purpose.

If the king or the West-India company, who were his grantees of the whole province, made no such reservations in their concessions or grants, it follows that the estates of the original proprietors of land on the Mississippi were bounded by the river and extended quite to its banks. This is not denied by Mr. Derbigny, neither does he deny that the property now covered by the suburb of St. Mary, while held by the Jesuits, under the grant made to them by the West-India company, had the same boundary with other estates held under similar grants, that is to say, that it was bounded by the river.

But in the year 1763, the order of Jesuits having been abolished in France, a judicial proceeding was instituted at New-Orleans, in the supreme court of the province, for the purpose of condemning their estates as confiscated to the crown. It appears by the authentic documents (which are inserted ante, notes A. C. page 343, 349) that this proceeding was instituted on the petition of the king's attorney *(sur la requete du procureur general du roi)* and that on the 9th of July, 1763, the court pronounced an *arret* or decree, by which they ordered all the estate and property real and personal *(tous les biens meubles et immeubles)* which belonged to the Jesuits, to be judicially sold (judiciarement vendus.) The sale was not, as with us, made out of court by a ministerial officer, but at the bar of the said court, in the presence of one of the judges thereof, and of the king's attorney, be-

fore whom the property was put up for sale by the court crier, the bids received and recorded, and the adjudication decreed to the highest bidder, and this decree of adjudication became the purchaser's title, without any other deed or conveyance being required.

The decree, therefore, which declared the Jesuits' property to be confiscated and ordered the sale thereof, made no kind of exception or reservation, but *all their property and estate, real and personal*, was directed to be sold to the highest bidder.

This circumstance is particularly mentioned because it is well known to all those who are conversant in the French system of law, that the attorney general, who was the mover of these proceedings, and who was present throughout the whole transaction, is officially bound in all cases to take notice of and to preserve the rights of the sovereign, wherever they may be concerned. It is more than presumable that if it had been the intention of the government to have reserved to itself the soil of the road in question, he would have taken care to have had that reservation expressly inserted in the decree. For that soil, it must be again observed, was *part* of the property of the Jesuits, and unless specially excepted, must be taken to have been ordered to be sold with the remainder of their estate.

Let us now see how this decree was carried into execution.

After the said decree directing the sale of the Jesuits' property had been given, the surveyor general was ordered to inspect all the title deeds and papers of that order, and to survey their lands, and in the report or return which the said surveyor made of his proceedings under the said order, he stated: "That, according to the said title deeds, papers, plan and official surveys, he had found that the said land ought to contain *thirty two arpents of front on the river St. Louis*" (trente-deux arpents de face sur la fleuve St. Louis." See the official copy of the said report now before me; see Mr. Livingston's ante page 345.

This survey was made on the 14th and returned on the 22d of July, 1763, after which the court proceeded to the sale of the property in six different lots; and in the decree of adjudication of each lot, the property sold was described as follows:

"A piece of land having ——— arpents *in front* on the usual depth of 40 arpents, situate on the other side of the river, with its *circumstances (q)* and dependencies, without retaining nor reserving any thing, from top to bottom, such as the whole now is and exists." *(r)*

This decree recited that the sale was made in pursuance of the prior decree of the same court, directing the sale of all the real and personal property of the Jesuits.

Mr. Derbigny now pretends that under these proceedings the whole of the front of the Jesuits' property was not sold, but that there was an implied reservation of the road and levee, and the following are his arguments.

First—That the reservation must be understood, because in the report of survey above mentioned, and in the decree of adjudication, the river is not expressly called for as the boundary of the land.

Our answer is that the front boundary of this estate is described precisely in the same manner as the front boundary of all other lands bounded by the river, used to be in the colony of Louisiana.

We have the testimony of M. Lafon now deputy surveyor of the United States for the county of Orleans, ante 354,

(q) This word is very material—It means, says Ferriere, Dictionaire de Droit, *hoc verbo*, all that is *adjacent* or *accessory* to a house or piece of land; *tout ce qui est* ADJACENT *ou accessoire à une maison, à une terre ou à une seigneurie.* The word *adjacent*, is synonimous to *contiguous*, and the word *accessory*, from the Latin *accedere*, to approach, means the same thing.

(r) "Une terre ayant———arpents de face sur la profondeur ordinaire de 40 arpents—située de l'autre bord du fleuve—circonstances et dépendances, sans en rien reserver ni retenir—de fond on comble—tel et ainsi que le tout se poursuit et comporte. See ante page 349.

and of the two Messrs Trudeau's, ante page 351, that they have never seen any concession or grant, either under the French or Spanish governments, which was not bounded by the river itself, and that all those concessions or grants, in order to designate such boundary, use these expressions, "*so many acres in front* (de face) *or so many acres of front to the river* (face au fleuve.)

Now it happens precisely that this decree of adjudication uses the very words "so many acres in front" (de face) while the report of survey on which it is founded makes use of the still more pointed expression of "*front on the river*" (face au fleuve) and the prior decree which is the foundation of the whole, designates *all the property* of the Jesuits as the object of the sale.

It is true, that none of these expressions convey in common parlance, the precise idea that the land is immediately bounded by the water's edge, but it is true that they do not negative that idea, and as they appear to be *technical expressions* which have been used in all grants, and the effect of which have ever been to convey the property in the land quite to the margin of the river, I do not see any reason why they should be denied here the legal meaning and effect which they have received, and are to receive in all other cases.

M. Derbigny criticises on the verbal meaning of these words, and takes great pains to prove that because a plantation is said to have *its front on the river*, it does not necessarily follow that it has the river for its actual boundary. I am not prepared to enter into this discussion. This is not a question of grammatical criticism; the words which are commonly used in legal proceedings, must be taken to have a fixed technical meaning, even though they should in common parlance, negative the very idea of the effect which the law gives them. The only question to be asked is, *what effect* does the law give to these words in all other cases? and the answer must apply to the case before us, unless there should be something peculiar in it to distinguish it from all others.

M. Derbigny, however, thinks that he has found such a distinguishing peculiarity in this case. He tells us that there is a great difference between a free grant or concession and a sale. That when this property was originally granted by the government of France, it was wild and uncultivated land, but that at the time of the sale under the decree, it had become valuable by the industry of man, and that there was then on it both a road and a levee. This is certainly true, but what does it prove? why, that when this land was wild and uncultivated, the king gave it away, and that now that it is become of value, he no longer gives it, but sells it for a valuable consideration. But it has absolutely nothing to do with the construction of a technical expression in the deed of sale.

M. Derbigny does not pretend to say that there existed at that time a *valuable alluvion*, and that as it is not expressly mentioned in the deed, it must be presumed to have been reserved. Were it even so, this consequence would by no means follow; but far from there being then a *valuable* alluvion, it is left in doubt at least, whether there was any alluvion at all. And as to the value of such property, it is a well known fact that these alluvion lands were absolutely worth nothing until after the cession. American industry and American enterprize set a value upon them, without which this controversy never would have taken place.

Secondly—M. Derbigny observes that there is no condition expressed in this deed of sale imposing on the purchaser the duty of keeping the road in repair, that therefore the soil of it must be presumed to have been reserved, for, says he, it would otherwise follow, that the purchaser might convert that road to his private use, without being obliged to supply another in the place of it.

I answer, that this consequence would by no means follow, for although the deed does not expressly impose such a condition on the purchaser, yet the law clearly does, and as he took the Jesuit's property as the Jesuits had it, and with an express reference to their title contained and specified in the

return of survey, he therefore undoubtedly took it charged with all the burdens which had been imposed upon them. That it was so understood in Louisiana, under the Spanish government, clearly appears from the Baron de Carondelet's letter to M. Gravier, of the 10th of March 1794, in which he gives him orders to repair the levee, and commends his former punctuality. Vide ante page 348.

The last argument of M. Derbigny which I shall take notice of under this head, is a criticism on some expressions contained in the return of warrant of survey above mentioned, from which he would infer an intended reservation of the soil of the road and levee.

It will be recollected that the surveyor general expressly says: That having examined the evidence of the title of the Jesuits, he found that they ought to have thirty-two arpents *of front on the Mississippi;* after stating thus much, instead, as is usual with us, of giving in a short description of the premises, the result of his survey, he proceeds according to the French custom to give an exact account of the mechanical operations by means of which he performed the survey which he was directed to make, and in the course of his relation, he says: That having examined the title deeds, &c. he began his operations, and drove in a stake at the distance of six toises five feet from the middle of the levee, from whence he took and measured the different courses. M. Derbigny pretends that this was done for the purpose of designating the front boundary of the estate, and therefore that it did not extend further towards the river than the place where the stake was driven in.

But M. Lafon and M. Charles Trudeau, both inform us, that this mode of operating never was intended to designate the boundary of the plantation on the side of the river; and that the usual manner of measuring such plantations, is by drawing a parallel line, as near as possible to the river, or by a perpendicular one on the sides, but that this line never designates the front limits of the plantation. And that the landmarks which are placed in the beginnings of the said

lines are intended only to show the directions which those lines ought to have. See pages 351-2-3, ante.

This matter being thus explained, every argument drawn from it in favour of the United States' claim must fall to the ground.

FOURTH POSITION OF M. DERBIGNY.

.....

"*The Alluvion in question has never ceased to be a Royal property, the enjoyment of which the French and Spanish governments at all times left to the publick, and on which they constantly hindered private persons from encroaching.*

This proposition is afterwards stated by M. Derbigny in other terms, to wit:

"*That the batture never ceased to be considered as a part of the royal demesne, and that to the time of the retrocession, the king of Spain never ceased to act as its proprietor.*"

I shall proceed to consider the allegations and test them by the facts that are in proof before me.

If the batture has never ceased to be a part of the royal demesne, there must exist some decree of a court of justice, or at least some edict or other publick act annexing it to the property of the crown.—We have already shown that by the French law, if there be no such formal annexation, the right of the king to such casual accessions of property is barred by an adverse possession of thirty years. If then it had been the intention of the government that the alluvions of the Mississippi should be considered as publick property, some such act would, it seems, have been necessary, if not to comply with the law, at least, to give notice to the inhabitants. We do not however merely rely as to this point on the general law of France, but on an edict, made expressly

for the colonies, which is much more pointed and which appears to leave no kind of doubt on the subject. We refer to an ordinance of Louis XV. made on the 17th of July, 1743, while Louisiana was fully in the possession and under the dominion of France. This ordinance is entitled "*A declaration of the king concerning grants of land in the French colonies*," and is to be found at large in M. St. Mery's collection, vol. 3, page 745. By the 5th article of this ordinance it is expressly provided that *all annexations of property* to the domain of the crown which shall not be judicially decreed, shall be null and void and of no effect. *(s)*

This ordinance appears to have been made for the purpose of protecting the subject in colonies so distant from the seat of government, and to prevent their being deprived of their property by acts of arbitrary power. I may therefore with propriety ask of those who support the claims of the United States, to produce the judicial act or decree by which these alluvions or any part thereof have been declared to be annexed to the demesnes of the crown.

Those who are not intimately acquainted with the details of the organization of the government of France and its colonies previous to the late revolution may perhaps imagine that those edicts were a mere dead letter, and that arbitrary acts supplied the place of law in almost every case. But let it be recollected that although the order of Jesuits had been abolished in France, and their property declared to be confiscated, yet the government of Louisiana did not venture to proceed to the sale of their estates in that province, without having previously instituted a regular suit and obtained a formal decree from the highest judicial tribunal in the colony.

The only governmental acts which are adduced in support of the allegation that the batture never ceased to be consid-

(s) "Art. 5. Déclarons nulles et de nul effet toutes concessions qui ne seront pas faites conjointement par le gouverneur et l'intendant, *comme aussi toutes reunions qui ne seront pas prononces,*

ered as a part of the demesne of the crown are a proclamation of the governor of Louisiana issued in or subsequent to 1794, by which he ordered certain buildings to be pulled down, which strangers had erected on that spot, and the repairs which about that time he caused to be made to the levee after M. Gravier had refused to repair it himself. But these facts, even admitting them to be true in their greatest extent, and without any possible qualification, are very far from proving M. Derbigny's broad proposition, that the batture *never ceased* to be considered as royal property; for, at any rate a single act of power can never be considered as an evidence of title. But the very circumstance under which this was done proves the contrary; for if the batture had always been considered as publick property, there was no necessity for the governor's applying to M. Gravier to repair the levee in the first instance, which was an acknowledgment of his right of property. But it is not all, we have it in proof from the testimony of Messrs. Laroche and Segur (vide ante p. 357–8) that Segur having contracted with the Baron de Carondelet, the same governor who issued the proclamation, for the supply of masts for the royal navy, and having requested him to point out a place where he could deposit the said masts, the Baron directed him to ask Gravier's *permission* to lay them on *his* batture.

Let these facts then which appear to have all happened about the same time, to be taken together, as they ought to be, and let any one say whether they support the proposition which M. Derbigny lays down in so broad and so unqualified a manner. Nay, the governor's acknowledgment of M. Gravier's right to the batture, which is in direct proof by his written order to him to repair the levee, leads us, necessarily to the conclusion that the proclamation ordering the buildings to be thrown down (the text of which we are not in possession of) was dictated from some considerations of local police, and was not at all meant an assertion of the title of the government to the property in question.

I shall say nothing of the answer of the auditor Vidal to the person who applied to him to establish a brick-kiln on the batture, "go tell the governor that it is impossible, for this batture is by law publick property," or words to that effect. Such a loose expression, perhaps not accurately recollected, and at any rate, a mere extra-judicial dictum of an auditor, cannot be considered as legal evidence of title in the Spanish government. This effect could at most be produced by his judicial opinion, reported in due form to the governor, and confirmed by him in his supreme judicial capacity. But this would be precisely such a document as we call for, and which has not yet been and I very believe will never be exhibited.

How comes it, if the batture in question never ceased to be considered as part of the royal demesne, and if the king of Spain, in the language of M. Derbigny, never ceased to exercise acts of ownership over it, that this long established and long exercised right of the Spanish government, was until very lately unknown to every person in the province, and even to the corporation of New-Orleans itself? For, when that body was contending with M. Gravier before the Supreme Court of the territory, for the possession of the property, they did not claim as bailiffs of the United States, or as their tenants at will or at sufferance; but they claimed in their own corporate right, and as far as I can judge from the formal pleadings and notes of the arguments, which I have had before me, the claim of the United States was not once mentioned while that cause was pending.

It is true, that after the court had delivered their final judgment against the corporation of New-Orleans, a motion was made for a new trial on the ground that the United States were entitled to the property, which motion, I am informed the court refused to grant. But this appears clearly to have been an after thought, suggested by the ingenuity of learned council; for it is evident, that if, as M. Derbigny asserts, the batture had never ceased to be a part of the king of Spain's domain, and if the king *had never ceased*

to act as its proprietor, the notoriety of that fact would have been such at New-Orleans, that the governor, the court, or the district attorney at least would have heard of it, and the corporation would not have been suffered to prefer their claim in their own name, without any notice being taken of so notorious a right in the general government.

The officers of the government of Spain appear to have been equally ignorant of it, for it is in proof from authentick documents, which I have perused, that in the year 1794, Mr. Gravier sold various parcels of the batture in question by several notarial acts passed before Mr. Pedesclaux, notary publick, who I am told was also at that time, secretary to the government.

Those who are acquainted with the nature and duty of the office of a notary of the civil law, and of the law of France and Spain on the subject, know very well that those officers not only attest the deeds which are executed before them, but that they draw them up entirely, according to the instructions of the parties and that they are personally responsible, under severe penalties, that the instruments which they so draw up and attest, do not contain any thing contrary to law, to religion, to morality, or to the interest of the sovereign. Code 1, 2, 14, 3—1st Ferriere's parfait notaire, 56.

Now in this state of things, would a notary, would a secretary to the government have lent his assistance to the sale by one man to another, of property which not only did not belong to the vendor, but which notoriously belonged to the king himself, who according to M. Derbigny never ceased to be exercising acts of ownership over it, acts to which the notary, in his capacity of secretary, must necessarily have been privy and the evidences of the king's right must have been lodged in his office if any where?

With these observations I shall take leave of this fourth point.

FIFTH POSITION OF MR. DERBIGNY.

.....

"*Neither Jean Gravier, nor those from whom he derived his title, ever were in possession of the alluvion, and Bertrand Gravier himself, at the time of settling a suburb in front of his plantation declared that he had no claim to the alluvion.*

This allegation divides itself into two distinct propositions, the first, that M. Gravier never had possession of the batture, the second that if he had, he afterwards abandoned or gave up his right.

As to the first point we say, that even if nothing more appeared, M. Gravier must be considered to have had precisely the same possession of his batture that the other owners of land on the Mississippi had of theirs. If in point of law it was to be considered as a part of his estate, it was not necessary that he should build an house, or erect improvements on every spot of his land, in order to be considered in the actual possession of it.

But we do not rely merely on constructive possession, because it is in proof that M. Gravier was ordered by the governor to repair the levee, that the same governor directed his permission to be asked for laying masts on that identical spot, and that in the year 1794, he sold several parcels of that same alluvion land, and reserved a right out of others to dig earth and sand, all which acts are incompatible with the idea of his being out of possession.

And lastly we consider this point as finally decided by the sentence of the Superiour Court in the case of *Gravier* vs. *The Corporation*, the court having decreed that he should be quieted *in his lawful possession of the batture;* if this judgment is not conclusive against all the world, as to the fact of possession by Gravier, it is at least the strongest evidence of it that can possibly be adduced. I proceed to the second point.

It is pretended that M. Gravier has abandoned his claim to the batture. Now, if he had no lawful claim to it, his abandonment is not necessary to make out the title of the United States, or of any other person who had a real right to that property; but if he had, I should think that it would require something more than evidence of some hasty words or of a loose conversation to devest his property out of him.

The facts appear to be these—M. Gravier having laid out the front of his plantation into a suburb, and the lots being all or mostly sold and built upon, was directed or asked to repair the levee, being considered as still the owner of the alluvion, as in fact he was, not having legally parted with it. At that time the batture was considered as of little or no value, and M. Gravier permitted the inhabitants of New-Orleans to make use of it for various purposes. To that order or request he is said to have replied, that as he had sold the fauxbourg he had nothing to do with the batture, and that he would not repair the levee or words to that effect. The expressions stated by M. Derbigny are, *that having sold the fauxbourg he considered himself as discharged from the duty of repairing.*

I can see nothing in these words that amount to an abandonment of M. Gravier's right of property in the batture. If the corporation, by his permission or sufferance, made use of it, and exclusively derived all the benefit from it, it was natural for M. Gravier to expect, that while they continued to enjoy that benefit they should be at the trouble and expense of the repairs. For, *qui sentit commodum, sentire debet et onus.* This appears to me to be the most natural, and I think the only probable interpretation of the words which are said to have been spoken by M. Gravier, if there be no misconception or misrecollection in the testimony of the witnesses.

To whom did M. Gravier abandon his right to the batture? Was it to the king, to the corporation, to the purchasers of the suburb lots, or to the first occupant? On this

subject every one is at liberty to draw what inference he pleases. While the suit was pending between M. Gravier and the corporation, the abandonment was said to be made to the citizens of New-Orleans, and after the judgment of a competent court has negatived the assertion, it is pretended that it was made to the royal majesty itself! The fact is, that it does not appear that M. Gravier made mention of either, and he does not seem to have thought of any thing but of discharging himself from the duty of repairing the levee, while others were enjoying the use and benefit of his property.

But even had this pretended abandonment been expressed in the strongest words that could be devised with a designation of the party in whose favour it was made, I ask whether the law of Spain permits a citizen to devest himself of his real property by mere word of mouth, and without committing the act in some manner to writing? If it does, I can only say that it differs from the law of every civilized country, where a due regard is paid to a regular transmission of real estates, and on that account that the existence of such a law ought to be clearly proved, whereas it is not even alleged.

And after all, even if M. Gravier, under a mistaken idea of his rights or of the rights of others, had made the most formal abandonment of the property in question, such an act would be relieved against in a court of equity. This relief was granted in England to the executor of a mortgagee who had assigned the mortgage to the heir, under the mistaken idea that the latter was entitled to it. *Turner* vs. *Turner*. 2 Chanc. rep. 81. Thus again if there is an agreement for the sale of an estate, and the purchase money has been paid, if it turns out that the estate was the vendee's, and that the sale was made under a mistake, the court will order the money to be refunded. *Bingham* vs. *Bingham*, 1 Vesey, 126. And there are a variety of other cases which might be cited to the same effect.

Now it must be plain that the United States could not even in that case, conscientiously take and retain property in consequence of an unguarded act, against which their own courts of equity would think themselves bound to grant relief.

.....

On the whole of this case, therefore, I am of opinion :

1. That by the law of France, as it stood to the time of the late revolution, the alluvions of navigable rivers did not, of right, belong to the king, but to the owners of adjacent estates.

2. That however the law might be in France on that subject there was no such prerogative in the French colonies, and particularly in the colony of Louisiana, where there was no feudality nor noblesse, and where lands, as far as we have seen appear to be held by an *allodial* tenure, which excludes feudal rights.

3. That even if it were otherwise, unless it should be clearly proved that there existed an alluvion or batture in front of the land where now stands the suburb St. Mary, at the time when Spain took possession and proclaimed the Spanish laws in 1769, the law of France cannot operate, but the case must be governed by the Spanish law, which is admitted not to vest any alluvion rights in the sovereign.

4. That even admitting the right claimed on behalf of the king of France to its fullest extent, and admitting that the batture or alluvion in question existed in 1769, yet as that alluvion never was, by judicial decree, declared to have been annexed to the demesne of the crown, it cannot now be considered as a part of it; it being clearly within the description of those *casual* rights or accessions, of which the sovereign by the law of France cannot be legally seized without a regular judgment of annexation to the crown.

5. I am further of opinion that the right of soil in the road and levee in front of the suburb St. Mary, has not been

either expressly or impliedly reserved by the government of France out of the sale which was made of the Jesuits' estate:

6. That neither the said road or levee nor the said batture or alluvion, have, at any time, been considered in law or in fact by the government of France or Spain in Louisiana, as a part of the sovereign's demesne; but that Jean Gravier, and those under whom he claimed, have always considered themselves and been considered by the said governments as the lawful owners thereof.

7. And therefore that the claim now set up on the part of the government of the United States to the said alluvion, as a branch of the royal prerogative or otherwise, is not founded, as far as I have seen, in either law or fact, and cannot be supported.

PETER S. DU PONCEAU.

Philadelphia, 26th July, 1808.

CASE

FOR THE CONSIDERATION OF COUNSEL.

.....,....

IN the month of August, 1717, the king of France made a grant to the West-India company, the fifth article of which is in the following words: "In order to provide the said West-India company with the means of making a permanent establishment, and to execute all the plans they may form, we give, grant and concede to them forever, all the lands, coasts, ports, havens and islands, which form our province of Louisiana, as well and with the same extent as we had granted it to M. Crozat, by our letters patent, dated 14th September, 1712, to enjoy the same in full property, lordship and justice, reserving to ourselves no other rights but fealty and liege homage, which the said company shall render to us, and the kings our successors, with a crown of gold of the weight of twenty marks."

By the 8th article they are empowered to grant lands in *franc-aleu* or *allodium*.

In the year 1726, M. De Bienville, governor of the province of Louisiana under this charter, grants to the company of the Jesuits twenty arpents in front, on the river Mississippi, by fifty in depth, to be held in "*franc-aleu*."

The order of the Jesuits being suppressed, and their property annexed to the crown, the plantation was divided into six lots, each fronting the river, and in the year 1763, sold to different persons. Two of these lots, by sundry descents and mesne conveyances were vested in John Gravier, the present party.

By the 15th article of the charter to the West-India company, the custom of Paris is established as the law of the province.

In the year 1762, before the sale of the Jesuits' property, the province of Louisiana was ceded by France to Spain, but possession was not taken until 1769.

The purchasers under the sale of 1763, have never been disquieted in their possession by the Spanish government after the transfer of possession.

Along the whole course of the Mississippi, a dyke or levee is thrown up, in order to restrain the water at the time of the annual inundation, which usually continues six months in the year, and by which the whole country would otherwise be covered, as the land on each side is lower as it recedes from the river until it reaches the sea.

Within the dyke is a highway, which, as well as the dyke or levee, is made and repaired by each inhabitant, as far as it extends along his land. The publick have always used the land between the dyke and the river for tracking boats, and other purposes of navigation. But as alluvions are frequent in that country, the inhabitants have always exercised the right of enclosing such alluvion lands by a new levee nearer the river, whenever the alluvion was of sufficient importance to bear the expense, giving to the publick a new road, and always leaving them the same right of using the ground between the new dyke or levee and the river, which they had before.

Between the dyke and the river, opposite the twenty acres sold by governor Bienville to the Jesuits, a considerable alluvion has been formed at different periods, since the year 1763, and possibly in some slight degree prior to that time.

The alluvion was not of sufficient value until the year 1803, to indemnify the proprietor for making a new levee, and of course the publick enjoyed it in common with the other lands between the dyke and the river, for tracking their boats, and other purposes of navigation, during the season in which it was not covered with water, that is to say, about six months in the year.

In the year 1788, the proprietor of this land laid out that part which lies within the road, into lots, and formed a

suburb: at that time a considerable alluvion had been formed. In selling the line of lots which fronts the road, he sells them by certain fixed boundaries, and according to a map on which the lots were delineated, but none of them are bounded on the river or go beyond the road.

In two or three instances he conveys besides the lots, *the alluvion land in front thereof*, reserving a servitude of digging earth on the alluvion.

There is evidence that at the time this suburb was laid out, the proprietor, being called on to make the road and levee, verbally declared that he conceived himself discharged from this duty, and that as he had sold the front lots he had abandoned the alluvion, but there is an uncertainty as to the nature of this abandonment: one witness says he declared it was to the city; another to the inhabitants of the suburb; and a third that it was to the publick. Since that time, to wit, from 1793 to 1803, the roads have been kept in repair once or twice by the publick criminals, the rest of the time by the inhabitants whose lots fronted the road. It is also in evidence that some short time after the establishment of the suburb, the governor directed all the buildings which had been erected (a few temporary sheds) to be demolished; but this is accounted for in two ways without considering it as an act of ownership. 1st—Because the publick had a right to use the land between the dyke and the river, for the purposes of navigation, although the property remained in the proprietor of the adjacent soil: the governor therefore (who was also judge) had a right to remove all buildings which obstructed this use, until the proprietor should by erecting a new levee, and making a new road nearer the river, give the publick the same facility of navigation which they had before. 2nd—It was proved by the clerk of the cabildo, or governor's council, that he had officially made the proclamation for demolishing the buildings, and that it was because they stood in the range of the fort guns.

All the proprietors of land on the Mississippi, without any exception (unless the present case may be considered as

one) have uniformly occupied and enjoyed the alluvion formed in front of their respective farms, without any claim being set up, either by the French, Spanish or American governments—and it is also to be remarked, that the proprietors of the other divisions of the Jesuits' farm, have always, without interruption, enjoyed their alluvion, although they hold under grants made at the same time, and in the same words with those in question. By treaty, dated 30th April, 1803, the province of Louisiana was ceded to the United States, and by the third article the inhabitants are to be secured in the possession of their property.

In the year 1804, John Gravier, the proprietor of the land, finding the alluvion of sufficient value and extent to justify the expense, threw up a dyke, enclosing a portion of about 500 feet square.

The inhabitants of the city of New-Orleans, had, prior to this period, 1804, as far back as the oldest witnesses could remember, been in the practice of digging sand from this alluvion, or making mortar, and filling the streets. This seems to have been permitted on account of the trifling value of the land, but about the time last mentioned Gravier opposed this practice; the corporation then claimed it as a right, and Gravier filed a petition to the Superiour Court of the territory, stating his right to the alluvion, and that the inhabitants of this city, disturbed him in the enjoyment of it, by digging the soil, and by publications tending to discredit his title, and praying that the corporation might set forth under what title they claim, and that he might be quieted in his possession, and they be perpetually enjoined from troubling him therein.

To this petition the mayor, aldermen and inhabitants, answer by first denying that Gravier is the owner.

2. By stating that B. Gravier, the ancestor of the plaintiff, had abandoned the alluvion to the publick, since which the levees have been repaired by the publick or by the city, that since that abandonment the inhabitants had never ceased to enjoy the use of the alluvion, for piling wood, unloading

boats, &c. That some individuals under the Spanish government had built houses thereon, which by order of government were destroyed.

The case being at issue on these pleadings, was heard at three several periods, and at length decided on the 23d May, 1807, by the decree, a copy whereof is annexed, in which the bench was unanimous.

After this decree a motion was made for a new trial; the ground relied on was that the alluvion belonged to the United States, and therefore the plaintiff could not recover. The court however rejected the motion, declaring that there was no colour of title in the United States. The judgment was confirmed and in the month of June following, carried into execution by the sheriff, who served the injunction on the defendents, and put the plaintiff in possession of that part of which he had been deprived.

Gravier having sold to Edward Livingston and Peter De La Bigarre the greater part of this alluvion; after the decree, they took possession, and having made a partition, Mr. Livingston began to make improvements on his portion, and upon the 25th of January, 1808, had expended about 13,000 dollars thereon—On that day a letter was received by the marshal of the district, from the secretary of state, telling him that it was the direction of the president that he should "go to the place called the batture, in front of the suburb St. Mary, and drive off all persons whom he *may find* thereon, who have taken possession since the 3d March, 1807." But neither Mr. Livingston, nor any other person under whom they claimed, had received any intimation or notice whatever, that any such proceedings were intended, or any citation to shew or defend their title. On the 25th of January, Mr. Livingston presented a petition, a copy of which is annexed, praying an injunction against executing the president's order. This injunction was granted and served, but disregarded by the marshal, who called out three regiments of militia, and drove off Mr. Livingston's workmen. These proceedings are understood to have had been

under colour of the law of the 3d March, 1807, entitled "An act to prevent settlements being made on land ceded to the United States, until authorised by law." 3 laws U. S. page 317.

And it is stated by the president, that he acted under an official opinion of the attorney general, that the land belonged to the United States.

Mr. Livingston can prove actual damage, in consequence of these proceedings, exclusive of the value of the property, to more than 40,000 dollars, for this year alone.

The Superiour Court of the territory of Orleans is a court in the last resort, from whose decrees there is no appeal.

On these facts the answer of counsel is required to the following questions:

I.—By what law is the claim of the proprietor of the twenty arpents front of the alluvion land, to be determined? By the law of Spain, to whom the country was conveyed prior to the sale in 1763? Or by the laws of France who actually held the country until 1769? If by the law of France is it not incumbent on the party contending for that law as the rule of decision, to shew that there was an alluvion formed between the year 1763, and the year 1769?

II.—There being no dispute as to the Spanish law, in case that is resorted to, it is required to know what is the law of the late kingdom of France, on the subject of alluvion on navigable rivers; does it belong to the king or the proprietor of the adjoining soil?

III.—What is the law on this subject, by the custom of Paris?

IV.—What is on this subject the law of the French colonies generally, and of Louisiana in particular, as it stood before the Spanish laws were introduced there?

V.—Did not the royal right of alluvions in those provinces of France, where it formerly prevailed, depend on the principles of feudal tenure; and will the king have it when it is granted in *franc-aleu?*

VI.—Does under the law of the late kingdom of France or of Louisiana as one of its colonies, or under the custom of Paris, the right of the publick to use a road along a navigable river, debar the proprietor whose lands are bounded on the river, of the right of alluvion?

VII.—Will the verbal declaration of the proprietor, that he had abandoned, deprive him of his property, without any evidence in writing, or any proof of the precise terms, time, and conditions of abandonment, or will it operate when the evidence is of the uncertain nature stated in the facts?

VIII.—Have the United States under the circumstances of the case now stated, any title to the land called the batture in front of the suburb St. Mary?

IX.—Was the order to dispossess the occupants of the batture, a legal exercise of the power vested in the president by the law of the 3d March, 1807?

X.—Was not the judgment of the court such a *prima facie* evidence of title, as should have entitled Gravier, and those claiming under him, to the right of a trial before he could be dispossessed?

XI.—If the law of the 3d March, 1807, should, in terms, authorise the proceedings that have taken place, is not the law itself unconstitutional and void?

XII.—Was it lawful in the president to issue his warrant before the commissioners had reported according to the proviso in the latter clause of the first section of the law?

XIII.—Has Mr. Livingston any action, and against whom for his damages?

No. I.

John Gravier, vs. *The Mayor, Aldermen, and Inhabitants of the City of New-Orleans.* } On a suit to quiet the plaintiff in the possession of the alluvion land, or batture fronting the suburb St. Mary.

JUDGMENT OF THE SUPERIOUR COURT

OF THE TERRITORY OF ORLEANS.

1st.—The title of Bertrand Gravier, the ancestor of the plaintiff to the tract of land on which the fauxbourg St. Mary is situated, has not been disputed; but it has been contended that this tract was bounded by the highway; the court however are of opinion, that according to the evidence exhibited, and the general usage of the country, this tract of land was bounded by the river Mississippi.

2d.—From the examination of the authorities, the court are of opinion, that according to the civil and Spanish laws, the right of alluvion is incident to land which is bounded by a navigable river, and that these laws must form the rule of decision in the present case.

3d.—If Bertrand Gravier therefore had continued proprietor of the whole tract on which the fauxbourg has been established, there would be no difficulty in determining his title to the alluvion: but Bertrand Gravier had devested himself of all title to that part of his tract on which the fauxbourg is established, by selling the lots fronting and adjoining the highway. It is therefore important to enquire what was the situation of the batture or alluvion in question, at the time the fauxbourg was established; or at least when the front lots were sold, for if no alluvion existed at that time, when Bertrand Gravier ceased to be the owner of the land adjoining the high road, then it is the opinion of the

court, that an alluvion subsequently formed, would not become the property of Bertrand Gravier. The reason of this opinion is, that if Bertrand could be considered as proprietor of the road, after selling the adjacent land, or of the levee lying between this road and a publick river, he would nevertheless not possess that title of property which gives the right of alluvion, for the destruction of this property, by the encroachment of the river, would be a publick and not a private loss, since it could not be appropriated to the use of any individual, and the said road and levee would have become necessarily liable to be kept in repair at the publick expense.

It is however the opinion of the court, from the evidence adduced in this cause, that antecedent to the time when Bertrand Gravier ceased to be the proprietor of the land adjacent to the high road, that a batture or alluvion had been formed adjoining the levee, in front of the fauxbourg, upon the river; and that this alluvion was then of sufficient height to be considered as private property, and had consequently become annexed to, and incorporated with the inheritance of Bertrand Gravier.

4th.—Bertrand Gravier having then acquired by alluvion, the property now in dispute, it is to be considered, whether he has devested himself of his title to the same? the court are of opinion that he has not. The evidence of abandonment is merely conversation, which past a long time ago; it is not very explicit and is much impaired by the circumstance of Bertrand Gravier having sold a part of his batture to one of the front proprietors. It would be dangerous to divest a man of his property upon evidence of such declarations, without any proof of a consideration.

With respect to the claim of prescription, it is sufficient to observe, that there has been no exclusive possession on the part of the defendants, and consequently they have no title on this ground. There are indeed other strong objections to a prescriptive title in this case, but the one we have stated is considered as sufficient.

5th.—With respect to the title of John Gravier, as founded on the inventory, appraisement and adjudication, which have been adduced in evidence in this cause, it is the opinion of this court, that they are not bound to determine the validity or invalidity of this title. First, whether John Gravier has purchased the whole, or only inherited an undivided part, his claim to be quieted in the lawful enjoyment of the property in question, against the adverse pretensions of the city, to the property of the soil, or the right of carrying it away, is sufficiently strong to enable the court to form a decision of the present case.

It is therefore ordered, adjudged and decreed by the court, that the petitioner be quieted in his lawful enjoyment of the batture or alluvion, described in his petition, against the claims and pretensions of the defendants, and that the injunction heretofore granted in this case be made perpetual.

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No. II.

To the Honourable the Superiour Court of the First District of the Territory of Orleans:

THE PETITION OF EDWARD LIVINGSTON, OF THE CITY OF NEW-ORLEANS, COUNSELLOR AT LAW,

Humbly Showeth:

That John Gravier by virtue of sundry grants from the crown of France, and divers mesne conveyances under them, in the month of November, in the year of our Lord, 1805, was possessed of and entitled to a certain farm, or parcel of land, part of which had been previously laid out into streets and lots, and was and is known by the name of the suburb St. Mary: That the said farm had, for sundry years past, increased by an alluvion formed by the river Mississippi, which is the front boundary of the said plantation, and which

by the laws of the land, became (in proportion as the same was formed) the property of the said John Gravier, and of the several proprietors of the said plantation under which he held, and was incorporated into the body of the said plantation, and by the laws aforesaid was so held as part of the same.—But the said John Gravier, and those under whom he claims, have uninterruptedly held the said plantation, of which the said alluvion so formed a part, for upwards of eighty years, until some short time previous to the month of November, 1805, when the mayor, aldermen and inhabitants of the city of New-Orleans, having disturbed him in the enjoyment of the said alluvion, he presented his petition to the Superiour Court, to be quieted in his possession, and relieved against the said disturbance, and that such proceedings were thereupon had, that the said Superiour Court on the 23d of May, 1807, pronounced the decree, a copy whereof is hereunto annexed, in pursuance of which decree the said John Gravier was put in peaceable possession of the said alluvion, and the said mayor, aldermen and inhabitants, were perpetually enjoined from disturbing him therein; and your petitioner shows that since the rendering the said judgment, he hath purchased from Nicholas Girod, and the trustees of Peter De Labigarre, under the title of the said John Gravier, and from the said John Gravier himself, in all, for the sum of eighty thousand dollars and upwards, all that part of the said plantation and alluvion, which is bounded on one side by the road and on the other by the Mississippi river, and extends from the limits of the city to the street called rue Julié, of which your petitioner was put in possession, and on which he has expended very large sums in improvements, and particularly in making a canal and levee, which are nearly complete: That your petitioner is informed, and verily believes, that the president of the United States, being ignorant of the true circumstances of your petitioner's title, but instigated as he believes by some malicious misrepresentations of your petitioner's enemies, has given directions to F. L. B. Dorgenoy, the marshal of the district, to remove your

petitioner by force from the said piece of land, so purchased by him as aforesaid; and that under colour of an act entitled, "An act to prevent settlements being made on lands ceded to the United States, until authorised by law," which law, as your petitioner is advised and believes, cannot apply to your petitioner's case, as by a reference to the said law will more fully and at large appear.

That if your petitioner is dispossessed at this season of the year, the greatest injury will result to him not only by the destruction of the unfinished works, by the annual inundation which may now in a few weeks be expected, but also by the failure of many contracts he has formed, and by the loss of the revenue arising from his canal and basin, for the next year.

And your petitioner shows, that the navigation of the river will be greatly impeded by the half finished works, and that the greatest danger is to be dreaded to the health of the city from the existence of a temporary dyke which it was your petitioner's intention to have removed prior to the rising of the waters.—Wherefore, and inasmuch as the said order must have unadvisedly issued, as the same is contrary to the treaty by which this country is ceded to the United States, to the laws thereof, and to the constitution, and particularly to that article which declares that no private property shall be taken for publick use without just compensation; and also in direct violation of that part of the ordinance for the government of this territory, which directs that no man shall be deprived of his liberty or property, but by the judgment of his peers or the law of the land:

May it please your honours to enjoin the said F. L. B. Dorgenoy, marshal, from executing the said order, and to grant to your petitioner such other relief as the nature of his case may require.

EDW: LIVINGSTON.

Signed and sworn to in open Court, 25th January, 1808.

J. W. SMITH, Clk.

Let an injunction issue agreeable to the prayer of the petition. 25th January, 1808.

GEO. MATHEWS, Jun.
JOSHUA LEWIS.

I hereby certify that the foregoing is a true copy of the original petition and order on file in this office.

J. W. SMITH, Clk. S. C.

March 28, 1808.

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Answers to Mr. Livingston's Questions,

BY MR. INGERSOLL AND MR. RAWLE.

1.—The law of that kingdom to which the country belonged when the title of the individual commenced, whether the present proprietor, or those under whom he claims, must govern. Whatever was expressed in the contract at the time of the first grant or conveyance from the crown or sovereign proprietor, is of course binding; and whatever from the then existing law of the country was implied, in relation to the subject of the contract, is equally binding. Whether the alluvion then existed or not, is consequently immaterial. It is a part of the contract that if at a future day it shall be formed, it shall go to the grantor or grantee, as the case may be.

The 2d, 3d, 4th, 5th, and 6th, questions turn on this general and important point. The law of France on the subject of titles to land, has not been a part of our regular studies. To hazard an opinion from an occasional view of it in the present instance, cannot be expected from us. We deem ourselves at liberty only to go so far as to say, that having attentively perused the opinions given by M. Derbigny, of

New-Orleans, on the one side, and M. Du Ponceau on the other, the weight of argument and authority appears to us clearly and amply in favour of the latter.

7.—This question is in a degree connected with the five preceding ones....It must depend on the laws of a foreign country, with which we are not conversant. As the facts are stated to have taken place while the country belonged to the Spanish crown, the question must be determined by the laws of Spain. We can only say, that if by the laws of that country the consequences supposed by M. Derbigny would flow from what is stated to have taken place on the part of M. Gravier, it must be a very singular and a very dangerous code, and that such consequences would not ensue by the laws of the United States.

8.—If John Gravier at the time of the cession of Louisiana to the United States, possessed a right to the alluvion in question, we are perfectly satisfied that the cession did not deprive him of it. The third article of the treaty of April 30th, 1803, expressly guarantees to the inhabitants of the ceded territory, their property as well as their liberty and religion.

The second article indeed professes to transfer only the publick property, and it would be injustice to suppose that any thing less was intended.

If at the time of the transfer, 1803, the alluvion did not exist, and if by the laws of the United States alluvions were publick property, a question might be raised, which, even under these circumstances, we should have little difficulty in deciding in favour of M. Gravier....But neither the fact nor the law occasions any doubt in this case; not the fact, because the alluvion was then very considerable; nor the law, because with us it is perfectly settled, that as to lands gained from the sea, either by alluvion, by the washing up of sand and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks back below the usual water marks, if the gain be by little and little, it shall go to the owner of the land adjoining; but if sudden and considerable, it goes to the state.

The 9th, 10th and 12th, may be considered together. It appears to us impossible to consider the proceedings of the executive, as authorised by any existing acts of Congress. The fourth section of the act of March 3d, 1807, authorises the marshal, under the instructions of the president, to remove from the "*lands aforesaid*," every person who shall be found on the same, and who shall not have obtained permission to remain thereon as aforesaid.

To ascertain what is meant by the "*lands aforesaid*," we recur to the first and second sections, where it appears to refer to lands ceded or secured to the United States by a treaty with a foreign nation, or a cession of any particular state, which shall be taken possession of after the passing the act, and which lands have not been previously sold, ceded, or leased by the United States, or the claim to which lands by such person has not been previously recognised and confirmed by the United States....The provisions extend to all the lands of the United States. In respect to the territory of Orleans, there is a special proviso, that nothing therein contained shall be construed to affect the right, title or claim of any person to lands, before the board of commissioners shall have made their reports, and the decision of Congress be had thereon.

Three commissioners were appointed by virtue of two acts of Congress (see dates and titles, vol. 7, 288, and vol. 8, 113) and the first of these laws sets out with a full and express confirmation of French and Spanish titles, if accompanied with actual possession, as therein mentioned.

The nature of the several rights or claims to lands, the mode of proceeding and reporting to the executive, in order that the matter may be laid before Congress, are described at large.

According to the case laid before us, M. Gravier, or those under whom he claims were in possession of the batture or alluvion at the time the act of March 2d, 1805, was passed. The possession as a matter of fact is established by the judgment of the Superior Court.

This possession as a matter of right, against the mayor, aldermen, and inhabitants is established by the same judgment. This document then of itself, shows that he is not one of those lawless intruders against whom alone the president is authorised to direct the summary and resistless powers given to him by the law.

We confess ourselves at a loss to discover by what chain of reasoning the executive administration of the United States have been able to bring such a case within the purview of these acts.

11.—In answer to the 11th question we can only say, that an act of Congress intended to authorise such proceedings as have been adopted in the present instance; forcibly and without a judicial hearing to dispossess those who for so many years have held a possession sanctioned by the laws of the foreign government under which title was originally acquired, solemnly promised by treaty to be secured to the individuals; recognised and confirmed to the full extent of the whole controversy before the court, by that portion of the powers of government which the constitution and laws of our country had invested in the highest judicial tribunal existing in the country....That such a law would not only be unconstitutional and void, but meet the severe reprobation of every thoughtful man, of every lover of his country, of every citizen of the United States.

13.—Mr. Livingston can maintain an action against the marshal and all who assisted him for his damages.

JARED INGERSOLL,
W. RAWLE.

Philadelphia, 3d Aug. 1808.

Answers, &c. by Mr. Edw. Tilghman and Mr. Lewis.

THE case stated by Mr. Livingston for the opinion of counsel, respecting his right to a part of the batture in front of the suburb St. Mary, at New-Orleans, seems to rest on grounds, and depend on principles, on which a satisfactory opinion may be given, so far as is necessary, without taking particular notice of the several questions proposed.

It is stated that the order of the Jesuits (to whom 20 arpents *in front on the river Mississippi*, by 50 in depth, had been granted, in *allodium* in 1726) being suppressed, their property was annexed to the crown of France; that this plantation was divided into six lots, *each fronting the river*, and sold in 1763, to different people, under some of whom M. Gravier, or rather Mr. Livingston derives title. It is therefore unnecessary to enquire, what the law of France respecting alluvions, was before or at this period, or whether any alluvion had then taken place, and equally so to consider, whether alluvion can in any case belong to the crown or state, in the case of allodial land; or where a whole province with all the lands, coasts, ports, havens and islands, within which the alluvion takes place is granted to one or more subjects, since the grant by the crown in 1763, to the person under whom Mr. Livingston claims, is stated to be *fronting the river Mississippi*, and it is therefore immaterial whether the crown held the alluvion, if any there was, by one title or the other.

It is also stated, that in 1762, before the sale of the Jesuits' property, the province of Louisiana was ceded by France to Spain, although possession was not taken by the latter till 1769. We have not the treaty containing this act, nor can it (we believe) be easily procured, but it is reasonable to presume, that when the cession was rendered complete by a change of the possession, Spain became entitled to all the rights, and no more, which France had at the date of it, except so far as the same was prevented by intermediate

grants from the crown of France, while she continued to exercise acts of sovereignty therein, and hence it follows that France had no right to any alluvion after 1762, the date of the cession, or at most after 1763, when she made grants of the Jesuits' tract, *bounded on the river*.

Nor could Spain have the right of alluvion after either of these periods, since it is admitted, that by the laws of that nation, alluvion is incident to land which is bounded by a navigable river, and belongs not to the crown, but to the owner of such land.

This being the case, we can see no room to doubt, but that all the increase by alluvion, from 1762 or 1763, to October 1, 1800, when Louisiana was retroceded by Spain to France, clearly belonged to the owner of the land, which gained it, and if it did, France acquired no right to it by the act of retrocession.

It is hardly necessary to consider, on what law the right of alluvion, in the legal sense and meaning of the word, between the 1st of October, 1800, when Louisiana was ceded by Spain to France, and the 30th of April, 1803, when it was ceded by the latter to the United States, depends; since the accumulation or recovery of soil from the river, between these periods, could not have been of sufficient height, to be capable of separate appropriation, and the object of distinct property from that of the first land.

The account given of a supposed abandonment of the batture, or alluvion, by Bertrand Gravier, is so vague and uncertain, and is in itself of such a nature, that it would not be regarded by our law, and it is strange indeed if it would be by any law: but as this depends on that of Spain, of which we have but very little knowledge, we shall leave it for the consideration of others. If he did not devest himself of it, the conclusion is, in our opinion, irresistible, that the United States have not the smallest colour of right to it. But unfounded as the title of the United States is, it seems to us, that the means used by them, or rather by the executive authority, to possess themselves of it, are not built on a more substantial basis.

The act entitled "An act to prevent settlements being made on lands ceded to the United States, until authorised by law," passed the 3d of March, 1807, under which the president is understood to have acted, provides among other things:

1.—That if any person shall, *after the passing of it*, take possession of, or make a settlement on any lands ceded or secured to the United States, by any treaty or cession, *until thereunto duly authorised by law*, he shall forfeit, &c. and moreover it shall be lawful for the president of the United States, to direct the marshal, or other person acting as such, in the manner therein after directed, and to take such other measures, and employ such military force as he might judge necessary, to remove from lands so ceded or secured to the United States, any person who should *thereafter* take possession of the same.

2.—That it should be lawful for the marshal after the first of January then next, under such instructions as might be given by the president, to remove from the land aforesaid any persons who should be found on the same, provided that three months notice should be previously given to such persons, as were settled on the same, prior to the passing of the act.

From the nature of alluvion, and especially of that gained from the Mississippi, there can be, *during its accretion*, hardly any other possession of it, than that which attaches to the possession of the land which gains it, or which remains in the proprietor thereof, after he may have parted with the land to which it had incorporated itself, and this we think a sufficient possession for all legal and reasonable purposes, so as to take the case out of the act. In addition to this, it is stated that the alluvion was of not sufficient value until the year 1803, to indemnify the proprietor for making a new levee, but that "in 1804, John Gravier, the proprietor, thinking it of sufficient value and extent to justify the expense, threw up a dyke of five hundred feet square of the alluvion," and if it belonged to him, and if there was no ex-

clusive adverse possession, this undoubtedly gave him complete possession of the whole of it, as fully as the act could by any fair or reasonable construction require. But what seems to remove all doubts on this head, is that about this time, Gravier opposed a practice, which had occasionally prevailed, for the inhabitants of the city to take sand from the alluvion, for the purposes of making mortar and filling the streets, on which they claimed it as a right, and he thereupon presented a petition to the Superior Court of the territory, stating his right to the alluvion, complaining of the disturbance, and praying that the corporation might set forth under what title they claimed it—that he might be quieted in his possession, and that they should be perpetually enjoined from troubling him therein; and it was so proceeded, that after a full hearing, the court declared on the 23d of May, 1807, that the alluvion belonged to Gravier, and ordered, that he be quieted in his lawful enjoyment thereof, and that the injunction which had been formerly granted, be made perpetual; and in June following the decree was carried into execution, by the sheriff's serving the injunction on the defendants, and putting the plaintiff into possession of that part of which he had been deprived. These proceedings, together with the previous statement, seem most incontestibly to prove that John Gravier could with no propriety be considered as a person *taking possession after the passing of the said act*, of lands ceded to the United States, and before he was *thereunto authorised by law;* and if so, it necessarily follows, that this case is not within the provisions of the act, and that the president had no authority to dispossess him under it.

It is however stated, that M. Gravier having after the decree, sold a considerable part of the alluvion to M. De Labigarre and Mr. Livingston, they took possession—made partition thereof between them; that the latter expended considerable sums of money in the improvement of his part; that on the 25th of January, 1808, the marshal of the district received a letter from the secretary of state, telling him

that it was the direction of the president, that he should go to the place called the batture, in front of the suburb St. Mary, and drive off *all persons whom he might find thereon*, who had taken possession since the 3d of March, 1807; and that in violation of an injunction granted by the same court to prevent it, the marshal executed this order by taking three regiments of militia, and driving off Mr. Livingston's workmen. It is added that it was stated by the president that he had acted under the official opinion of the attorney general, that the land belonged to the United States, and it is also added that neither Mr. Livingston, nor any other proprietor or person under whom they claimed, had received any intimation or notice of any such proceeding being intended, nor were they called upon to show or defend their title.

The third article of the treaty of April 30th, 1803, by which France ceded Louisiana to the United States, expressly guarantees to the inhabitants of the ceded territory, their property, as well as their liberty and religion, and no act of congress, if it were possible to suppose them capable of intending it, could constitutionally authorise the president to deprive them of either. *That*, under which he is supposed to have acted, does not direct the mode by which he shall ascertain whether the lands on which individuals may be settled are secured to them by treaty, or whether they belong to the United States, under the general words of the cession, nor whether they were taken possession of before or after the passing of the act—Nor whether it was by intrusion or by regular process and judgment of the law, but it very properly leaves him to pursue the legal means of enquiry, and when this is done, to cause the removal of any lawless intruders.

A due regard for the rights of property, the security of individuals and the laws and constitution of the country, therefore required, that before force, and especially military force was resorted to, a legal inquest of these several matters, which were all essential to his jurisdiction, should have taken place under a special writ of enquiry, framed according

to the spirit of the act, and adapted to the case, or in a prosecution for the penalties incurred by intruders against it, or in some other legal manner, where the party might be heard, and have an opportunity of showing and vindicating his rights, whatever they might be; but instead of this, the president appears to have referred an *ex parte statement* to the attorney general, and on his *ex parte opinion*, to have determined in an *ex parte manner*, that the alluvion or batture in front of the suburb St. Mary, was not the property of individuals, guaranteed to them under the solemnity of the treaty—that the possession thereof was not "authorized by law," although the record of the highest legal tribunal in the territory showed that it was, and that M. Gravier, after having been disturbed, was not such an intruder as the law contemplates, but was legally put into possession by the sheriff, under the judgment and process of law; and what is still more extraordinary the president appears to have left it to the marshal, a mere ministerial officer, altogether unauthorised to judge in the case, to determine who had taken possession *before* or *after* the passing of the act, and without regarding whether it was by the judgment of a court or not; for the orders to him are stated to be "to go to the batture and drive off all persons *whom he might find thereon, who had taken possession since the 3d of March*, 1807." This order is not only as general in its nature but as illegal in its principles, if not as dangerous in its consequences, as any general warrant ever was; for it sets at nought a law of the United States—a solemn treaty, and the decision of a legal tribunal of the last resort; and we are therefore of opinion, that those who issued it, the marshal who obeyed it, and all who aided and assisted in its execution, are joint trespassers and answerable in damages to Mr. Livingston, for the wrong and injury which he has thereby sustained.

EDWD. TILGHMAN.
W. LEWIS.

Philadelphia, Aug. 16th, 1808.

District Court of the United States.

NEW-YORK DISTRICT, August Term, 1809.

United States

vs.

Hezekiah Smith, Stephen Griffith and Nathaniel L. Griswold.

TALMADGE, *Judge.* This action was upon a bond executed by the defendants to the United States and delivered to the collector of the port of New-York, having annexed the following condition, viz. "Whereas the following "goods wares and merchandises, that is to say, 1272 bar- "rels flour, as per manifest now delivered to the collector "of the customs of the port of New-York and intended to "be transported in the said vessel called the James Wells, "burden 178 11-95 tons to the port of St. Mary's in the "state of Georgia: Now, the condition of the above obli- "gation is such that if the above-mentioned goods wares "and merchandises, shall be relanded in the United States, "*at the port aforesaid* or at some *other* port of the United "States the dangers of the sea excepted, the said obliga- "tion shall be void, otherwise, &c."

The bond was taken by the collector under authority of the 2d § of the embargo act of the 22d December, 1807, requiring that no vessel shall be allowed to depart from one port to another of the United States, unless the master, &c. shall first give bond with one or more sureties "*to the collector of the district*," that the goods, &c. shall be relanded "*in some port of the United States.*"

It was argued, upon demurrer, by Messrs. Riggs, Hoffman and Emmet for defendants, That a bond required and taken under colour of a statute is not valid unless the same is in strict conformity with the authority of the act; that the

statute under colour of whose authority this bond is taken requires the security "*to be given to the collector of the district*," whereas it is made payable to the United States and is conditioned to reland the goods, &c. at *the said port of St. Marys* or at some *other* port of the United States, which being a variance from the words and authority of the act the bond is against law, and void as well under the act as at common law.

Mr. SANDFORD for the United States.

The Judge said that the authorities cited by the defendants' counsel were decisions upon the particular words of the 23d of Henry VIth, authorising and requiring bail bonds; which statute prescribes the form of the security and declares all others to be void, and hence it was very properly decided that the particular form marked out was alone decisive and all others void per force of the statute. That the purpose of that act was to correct abuses which had crept into a system of former practice; the purpose of the act in question is to create an entire new system, it prescribes no form of bond nor avoids any that shall be adopted; it merely authorises the president to give such instructions as appear the best calculated to carry the act into effect—That he was satisfied upon an attentive perusal of the act, it did not mean to confine the security to the person of the collector as the obligee, but merely through his agency to ensure by bond, a conformity to its restrictions, and that the bond as taken embraced the substance and was within the spirit and authority of the act—a voluntary bond and valid—

Judgment for the United States.

.....

United States vs. *Brig Little Ann.*

This brig having the president's permission to proceed to the West-Indies for American property, sailed from Bristol in the state of Rhode-Island, and when at sea off the East

end of Long Island was captured by the United States' frigate Chesapeake and sent into this port for trial.

Besides the articles of permitted stores there were found on board other goods, and the libel charged her with lading on board merchandise in the night time without the permit of the collector or the inspection of a custom house officer and of exporting the same.

The Judge condemned the vessel and cargo on the ground of an unlawful exportation from the United States, and decreed restitution of the articles which were permitted by the collector as necessary stores for the voyage, and ladened under proper inspection.

.....

United States vs. *Sloop Polly and Jane.*

In this case the libel also charged a lading without permit and inspection, and it appeared in evidence that goods of a greater value than $ 400, were so taken on board the sloop, as composing her cargo for an intended illicit voyage, but that the lading was effected at different times and places and at no one time to the amount of $ 400 worth. His honour held the different ladings of the cargo as aforesaid to be a continuation of the same transaction and one offence; and that the aggregate value of the goods so laden exceeding in amount the sum of $ 400, the vessel, &c. became liable to forfeiture.—Condemned.

.....

Manner of Proving Deeds in New-York.

Every deed, conveyance or writing relating to the title or property of any lands or real estate within this state, being duly acknowledged by the party or parties executing the same, or proved by one or more of the subscribing witnesses

thereto, before one of the judges of the Supreme Court of the United States, or before one of the justices of the Supreme Court of this state, or a master in Chancery, or the first judge of any Court of Common Pleas, or before any other of the judges of the Court of Common Pleas of the county where such lands or real estate are situated, or if the same be situated in the cities of New-York, Albany or Hudson, before the mayor or recorder of the said cities respectively, and a certificate of such acknowledgment, or proof being endorsed thereon, and signed by the person before whom the same was taken, shall and may be recorded in the office of the secretary of this state, or of the clerk of the county in which such lands or real estate are situated. *Provided however*, that no such acknowledgment shall be taken, unless the officer taking the same shall know, or have satisfactory evidence that the person making such acknowledgment is the person described in, and who has executed such deed, conveyance or writing, and that no such proof shall be taken unless the officer taking the same shall know the person making such proof, or have satisfactory evidence that he is a subscribing witness to such deed, conveyance or writing, and that such witness knew the person who executed the same, all of which shall be inserted in the said certificate of such acknowledgment or proof; and in case of the examination of witnesses, it shall also be the duty of such officer to set forth in such certificate what witnesses were examined before him, and the substance of the evidence by them given:

II. "No estate of a feme covert residing in this state shall pass by her deed, without a previous acknowledgment taken in manner aforesaid, and made by her on a private examination apart from her husband, that she executed such deed freely, without any fear or compulsion of her husband, which shall in like manner be contained in the certificate of such acknowledgment to be endorsed on such deed; but where any feme covert not residing in this state, shall join with her husband in any deed or conveyance of, or relating

to any lands or real estate situated within this state, she shall thereby be barred of, and from all claim of dower, and all other right and title therein, in like manner as if she were sole, and the acknowledgment or proof of such deed, conveyance or writing may be the same as if she were sole, and shall entitle such deed, conveyance or writing to be recorded as aforesaid."

III. " All acknowledgments and proofs of any deeds, conveyances or writings made as aforesaid by British subjects actually residing within the kingdom of Great Britain, or the dominions thereunto belonging to any citizens of this state, of or concerning any lands or real estate situate in this state, taken or made, or hereafter to be taken or made before the mayor of the city of London, and duly certified under the seal of office of the Mayoralty of the said city, or before any minister of the United States resident in Great Britain, shall be of the like force and validity, and entitle the same to be recorded, as if the same were taken before a judge of the Supreme Court of this state."

IV. This section provides, That deeds executed " after the first day of February, 1799, for lands situate in the several counties of Ontario, Steuben, Tioga, Herkimer, Onsida, Chenango and Otsego," or any writings which may affect them either in law or equity, after proof as aforesaid " shall be recorded in the clerk's office of the county where situated, and unless so recorded " shall be adjudged fraudulent and void against subsequent *bona fide* purchasers or mortgages for valuable consideration" if their conveyance is first recorded.

V. Provides, That the secretary or clerk shall record the conveyances aforesaid " in the order and as of the time when the same shall be delivered for that purpose, and shall be considered as recorded from the time it was so delivered ;" " and the secretary or clerk shall endorse and sign a certificate on such deed, conveyance or writing of the particular time when, and of the book and page in which the same is recorded, and " that every deed, conveyance or

writing so acknowledged or proven, whether the same be recorded or not, or the record thereof, or a transcript of such record certified by the secretary of this state, or the clerk in whose office the same may be recorded or registered under the seal of the Court of Common Pleas of the county where he is clerk, may be read in evidence in any court of this state without further proof thereof."

VI. No secretary or clerk shall record any deed, conveyance or writing unless proven as aforesaid, and which acknowledgment or proof shall be recorded therewith.

VII. If either of the persons within this state authorised to take the proof aforesaid, or the secretary or clerk, or their deputy shall be guilty of any neglect, misdemeanour or fraudulent practice in the execution of their respective duties prescribed by this act, they shall be liable to pay to the party injured treble damages with full costs.

VIII. A repealing section.

☞ *Nota.* Except in the counties mentioned in § IV. no deeds are obliged to be recorded—since this act, several of those counties have been divided and new counties created out of them, to which new counties this law applies.

The 1, 2, and 3, sections are copies of the act—the 4 and 5 are abridged, except those parts which are marked by comma's—The substance of the 6, 7, and 8, is only given.

CIVIL LAW.

(TRANSLATED FOR THE AMERICAN LAW JOURNAL.)

Continued from Vol. II. page 250.

A Translation of the First Title of the Fourteenth Book of the Digest, entitled:.....De exercitoriâ actione.

DIGEST, Book XIV. Tit. I.

Of the responsibility of Ship Owners, for the acts of the Master, and of the action which results therefrom, called actio exercitoria.

LAW I.

Ulpianus, lib. 28. Ad Edict.

Utilitatem....The usefulness of this edict is so evident, that every one must be sensible of it. For, as we are sometimes obliged to contract with masters of vessels, with whose persons or condition we are entirely unacquainted, it is equitable, that he who has appointed such master to the command of the vessel should be bound by his acts, in the same manner as he is bound who appoints an agent, factor or deputy to his tavern or traffick, the necessity being greater to contract with the master of a vessel, than with such agents. For we may enquire into the condition of the agent with whom we contract, but not so with a master of a vessel, for, sometimes, neither the time nor the place will allow of deliberation.

Magistrum Navis. § 1. We call him the *master of a ship* who has the care of the whole vessel.

Sed si. § 2. (But) if we *contract* with any of the mariners, we have no action against the owner, although an action lies against him for the *tort* of any of those who are on board

the vessel for the sake of navigating her. For there is a difference between torts and contracts: he who appoints a master, tacitly authorizes you to contract with him; he who appoints mariners, does not so authorize you, but is nevertheless answerable for the frauds and tortious acts which they may commit.

Magistri autem. § 3. Masters are appointed for the sake of letting vessels to hire either to transport merchandize or passengers or to purchase things necessary for the furniture of the vessel: but if he is also appointed to buy or sell merchandize, he binds the owner *hoc nomine.*

Cujus autem. § 4. It matters not what is the condition of the master, whether a freeman or a slave, and whether the servant of the owner of the vessel or of another; nor matters it of what age he is, he who appoints him being to impute all to himself.

Magistrum autem. § 5. We not only call him *master* whom the owner has appointed, but him also whom the master has put in his place, and so the learned Julianus answered to an ignorant owner. Besides, if he knows and suffers him to act as master in the vessel, he is supposed to have appointed him. This opinion appears to me indisputable. For, he who has appointed a master, must answer for all his acts, otherwise those who contract may be deceived, and this is more easily admitted against masters of vessels than against other agents, for the sake of utility. What then if he who appointed the master, forbid him to substitute another in his stead? We must see now whether we can admit the opinion of Julian in this case. Suppose the owner has positively forbid the master to appoint Titius, by name, as his substitute. It must be said, however, that even in that case, the interests of those who navigate must be attended to.

Navem accipere. § 6. *Navis* is a generic name for all vessels, whether they navigate on the seas or in lakes, or in rivers, it also applies to boats. *Schedus*).

Non autem. § 7. The prætor, however, does not, in all cases, give an action against the owner, but only for such

things to which the master *has been appointed*, that is to say: If he has been appointed to that particular thing, as for instance, if he has been hired to carry a burthen, or has purchased some thing useful for the passengers, or if he has contracted for any thing for the ship's repairs, or with the mariners for their labour and hire.

Quid si mutuam. § 8. What if he has borrowed money, it will be considered as done in the regular course of his business? Pegasus is of opinion, that if he has borrowed it for the use of that thing to which he is appointed, an action will lie, which opinion I conceive to be correct. What then if he has borrowed for the sake of fitting out the vessel and hiring mariners?

Unde quærit Ofilius. § 9. Hence Ofilius makes a query, whether if he has borrowed money for the repairs of the vessel and afterwards converts it to his own use, an action will lie against the owner? And he says; if he borrowed it *hac lege*, for the purpose of employing it on the vessel, and afterwards altered his mind, the owner is liable, and must impute it to himself that he appointed such a man; otherwise, if his intention was from the beginning to defraud the lender, and if he did not specially express, that he borrowed it for the use of the vessel: which distinction Pœdius proves.

Sed et si in pretio. § 10. But if the master deceived him with respect to the price of the things purchased, it will be to the damage of the owner not of the lender.

Sed si ab alio. § 11. And if having borrowed money of another, he should pay with it the one who had lent money for the repairs of the vessel, I think that this second lender is entitled to his action in the same manner as if he had advanced the money to the use of the vessel.

Igitur præpositio. § 12. The appointment therefore points out a certain rule to those who contract. For, if one has been appointed to the command of a vessel, to receive freight money; but not to let out the vessel, the owner shall not be bound, if the master lets her out, and *vice versa*, if to let to freight and not to receive or demand it, or if he appointed

him to take passengers and not to take goods to freight, or *vice versa*, if he exceed his powers, he shall not bind the owner. If he is appointed to let out the vessel for the freight of certain goods, as for instance hemp or vegetables, and instead of that he takes in marble or other articles, it is said the owner shall not be bound. For there are ships expressly made for carrying of bulky articles, others for the carrying of passengers, and I know that several owners command their captains not to receive passengers, and also to traffick in certain regions and in certain seas. There are for instance some vessels which carry passengers from *Cassiopa* or *Dyrrachium* to *Brundusium*, and which are unable to carry burthens; some of them are able to sail on rivers but not on the sea.

Si plures. § 13. If there are several masters whose offices are not distinct, what is done by any one of them shall bind the owner; if their offices are distinct, as the one to take freight, the other to receive the freight money, each shall bind the owner for what he does in the execution of his particular office.

Sed & si. § 14. But if they have been so appointed, as is done in several instances, so that none of them shall do any thing without the concurrence of the other, whoever contracts with one of them singly, must impute it to himself.

Exercitorem autem. § 15. We call *exercitor (a)* the person who receives the freights and profits of a vessel. Whe-

[*(a)* The Latin word *exercitor* cannot be rendered by an exactly corresponding word in our language; it answers to the French word *armateur*, and means not only the actual owner of a vessel; but he who is in possession of her, whether for himself or for another, who has the care of fitting her out, and who acts as owner, though it may not be in his own right. Thus a special owner, one who holds a ship in pledge to pay himself out of her freights, or one who has hired her for a voyage, or for a limited time, and also he who has the vessel in charge as the agent or factor of the owner or owners, all come within the meaning of the word *exercitor*. The master himself may be *exercitor* in many

ther he be himself the owner of the ship, or whether he has hired her from the owner for a time or forever.

Parvi autem. § 16. It matters little, however, whether this *exercitor*, this general or special owner, is a man or a woman, a father or a minor or a slave; but if a minor owns a vessel, the authority of his guardian is requested to legalize his contracts.

Est autem. § 17. It is at the party's election to sue either the owner or the master.

Sed ex contrario. § 18. But on the contrary, this action (the *actio exercitoria*) does not lie, for the owner against those who contract with the master, because he does not want this extraordinary remedy; but he may sue the master *ex locato*, if he employed him for a reward, or *ex mandato*, if gratuitously. When employed however, in the transportation of provisions, the prefects of the capital and the presidents of the provinces for the publick benefit, will give to owners an extraordinary action, founded on the contract of the master.

Si is, qui navem. § 19. If the *exercitor* of a vessel is in another man's power, and acted as such with his consent, judgment shall be given against him in whose power he is, on contracts made with the master.

Licet autem. § 20. But although an action lies against him in whose power he was, who acted as *exercitor* of the vessel, it must appear that he thus acted with his consent. They therefore are bound *in solidum* (jointly and severally)

cases and under a variety of circumstances. The English term "*ship's husband*" comes nearest to the idea which the word *exercitor* conveys to the mind, but it is a word but lately brought into use, and not yet sufficiently defined; it has been generally employed for the *acting owner*, the one of the part owners who has the actual charge of fitting out the vessel, but we do not know that it has yet been applied to a *mere agent*, though perhaps it might be so applied without impropriety. It must be left to time and usage to fix the precise meaning and application of that word.]

who have the *exereitor* of a vessel in their power, because the employment of vessels is a matter of the highest importance to the commonwealth. But the usage is not the same with respect to factors not employed in and about the fitting out of vessels, those who contract with one of those who traffics for his own account, with the consent of his master, parent or guardian shall only be entitled to relief to the amount of the factor's *peculium*, or hereditary portion. But if a contract has been made with the master of a vessel with the knowledge, though without the consent of him in whose power he is, shall we give an action *in solidum* against the master, father or guardian as if he had consented, or only an *actio tributoria*, that is to say, extending only to the *peculium* or hereditary portion of his dependent? It is best in a doubtful case to follow the words of the edict, and not to raise an obligation *in solidum* from the mere knowledge of a father or master in the case of vessels, nor from his consent in the case of mere land traffick, and such seems to be the opinion of Pomponius; if, says he, the master of a vessel is in another man's power, and act with his *consent*, then the person in whose power he is will be bound with him *in solidum*, otherwise then only *in peculium*.

In potestate. § 21. By those that are in other persons' power we mean, sons and daughters and servants of either sex.

Si tamen. § 22. If, however, a *servus peculiaris*, that is to say, a slave belonging to a minor or to another slave, as a part of his *peculium*, shall act as *exercitor* of a vessel with the consent of the minor or slave to whose *peculium* he belongs, the father or master who has not given his consent shall be held only *de peculis*, but the son himself shall be held *in solidum*. Clearly if they act as *exercitors* with the consent of the father or master, they shall be bound *in solidum*, and also the son, if he gave his consent, shall likewise be bound *in solidum*.

Quamquam. § 23. Although the prætor allow the action only in case of a contract with the master yet (as Julian has

also written) even if the contract is made with the *exercitor* himself, the father or master shall be bound *in solidum*.

Hæc actio. § 24. This action is given against the exercitor *ex persona magistri*, and therefore if you elect to sue one of them, you cannot afterwards sue the other; but if the master pays any thing, the obligation shall be so far diminished, and so if the exercitor pays any thing either on account of his *honorary* obligation, or in the name of the master, the obligation shall be lessened, because he that pays for me discharges me.

Si plures. § 25. If several act as exercitors of a vessel you may sue all or any of them jointly and severally.

LAW II.

Gajus, Lib. 9. *edictum provinciale.*

Ne inplures....No man shall be driven to several adversaries who contracted only with one.

LAW III.

Paulus, Lib. 29. *ad edict.*

Nec quicquam....It makes no kind of difference what share he who contracted had in the vessel, it is his business to make the other part owners contribute by *action of partnership.*

LAW IV.

Ulpian, Lib. 29. *ad edict.*

Si tamen....If several act as *exercitors* of a vessel in their own persons they shall be bound according to their respective shares, nor shall they be considered as masters of the vessel for each other.

Sed si plures. § 1. But if several owners of the same vessel appoint one of their number to be the master, they may be sued on his contracts *in solidum.*

Sed si servus. § 2. If a servant to several owners act as *exercitor* of the vessel with their consent, it will be the same as in the case of several *exercitors;* it is clear that if he acts with the consent of one of them, that one is bound jointly and severally with him, and therefore I think that if he acts with the consent of all, they are all so bound.

Si servus sit. § 3. If he who acted as *exercitor* of the vessel with the consent of his master was a servant, and the master alienes him, he who aliened him is still bound, and likewise if the servant dies, he shall be bound, for he is bound for the master of the vessel though he is dead.

Hæ actiones. § 4. These actions will lie for ever for and against the heirs, so if a servant dies who acted as *exercitor* of a vessel with the consent of his master, this action shall be given after the year, although actions *de peculio* are to be brought within the year.

LAW V.

Paulus, Lib. 29. *ad Edict.*

*Si eum....*If you have for master of your vessel a person who is in my power, I have an action against you if I contract with him. The same if he is our common servant. You will however have an action against me *ex locato* for having hired the labour of my servant, &c. *(The remainder of this § is uninteresting, and relates only to the hiring of slaves, &c.)*

Item, si servus. § 1. Also if my servant acts as *exercitor* of a vessel, and I contract with the master or captain appointed by him, this will not prevent me from having my action against the captain, either *jure honorario* or *jure civili*, for this edict does not prevent any other person from having his action against the master; and the remedy given against the

owner by this edict is cumulative, and the right of action against the master is not taken away by it.

Si unus. § 2. If one of the owners contracts with the master, he has his action against the other owners.

LAW VI.

Paulus, Lib. 6. *Brevis Edicti.*

Si servus non....If a servant or slave acts as *exercitor* of a vessel without the consent of his master, an action is given against him with this difference, that if it is with his master's knowledge, the action is *quasi tributoria*, if without his knowledge, then *de peculio.*

Si communis. § 1. If a slave belonging to several persons acts as exercitor of a vessel, with the consent of his masters, then an action lies *in solidum* against every one of them.

LAW VII.

Africanus, Lib. 8. *Quæstionum.*

Lucius Titius....LUCIUS TITIUS appointed *Stichus* master of his vessel: he having borrowed money, undertook that he had received it for the repairs of the vessel. It is asked whether *Titius* is answerable in an *actio exercitoria* in like manner as if the lender should prove that the money had been actually employed in repairing of the vessel? It is answered that the lender has an action, if when he lends money the vessel was actually in want of repairs, that it is not however necessary that the lender should take upon himself the charge of repairing the vessel, and thus do the business of the owner (which must undoubtedly be the case if he is obliged to prove that the money has been laid out in repairs:) it is enough that he knows that he lends it for a purpose which falls within the master's power and authority, which cannot be done otherwise but by his knowing also that the

money he lends is necessary for repairs; therefore, although the vessel be in actual want of repairs, yet if *much* more money should be lent than was necessary for those repairs, no action *in solidum* is given against the owner of the vessel.

Interdum. § 1. We must also enquire whether the money was lent in such a place where the thing for which it was borrowed could be purchased. What if one has lent money to purchase a sail on an island where no sail at all can be got? In short, the lender must use *some diligence* about this matter.

Eadem. § 2. The same thing nearly may be said respecting the *actio institoria*, that is to say, the action founded on the acts of *factors in the land trade.* For here the lender must also know that the money was necessary to purchase the merchandize which the agent was entrusted to buy, and it is sufficient if he lent it for that special purpose, the lender is not obliged to take upon himself to see that the money is actually so employed.

REVIEW.*

Discussions du Code Civil dans le Conseil d'Etat, &c. i. e. Discussions respecting the Civil Code, in the Council of State, preceded by the corresponding articles of the text and the *projet*; with notes, principally relating to the observations and the jurisprudence of the Courts of Reversal and Appeal. On the *plan* of *M. Regnaud*, (of St. Jean d'Angely) counsellor of state, &c. &c. By M. M. Jouanneau and L. C. De Solon. Quarto 2 vols. Paris.

WHATEVER progress was made during the last century, in various parts of useful or ornamental knowledge, it does not appear that this epoch has reason to boast of any considerable advances in the theory or the practice of legislation. Russia, Prussia and Tuscany had their legislating sovereigns: but their codes are little known out of the states for which they were framed; and we do not find that they had the effect of ameliorating either the constitution or the jurisprudence even of those countries. In France, indeed, a noble undertaking had been carried on for a considerable length of time, and was near its completion, when, with many other extensive and salutary projects, it was overturned by the revolution. We allude to the reduction and reformation of the customary laws of its different provinces. From the work of one of our own countrymen, which we are now perusing,† we learn that this design was conceived in the reign of Charles VII. Soon after he expelled the English from France, he published an ordinance by which he directed all the customs and usages of his kingdom to be committed to writing, to be verified by the practitioners of each place, and to be sanctioned by the great council and parliament; and he ordered that the customs thus sanction-

* Monthly Review.

† *Horæ Juridicæ Subsecivæ*, by C. Butler, esq. of Lincoln's Inn. App. Rev. vol. lv.

ed, and those only, should have the force of law: but such were the obstacles in the way of this measure, that forty-two years elapsed before the customs of any one place were verefied. From that time, the measure lingered till the reign of Louis XII; it was then resumed; and about the year 1609, the reduction of the customs was completed. Those of Paris, Orleans, Normandy, and some others, were soon afterwards reformed: Those of Artois and St. Omers underwent this revision about the middle of the last century; and the reformation of the others was nearly finished. The ultimate object of the plan was to abolish all local customs; and from the general body of the customary law, and the doctrines of civil law, to establish an uniformity of jurisprudence throughout the kingdom. It was a favourite object of the chancellor *d'Aguesseau*; and he had digested it into a regular plan.

In the reign of Louis XIV. much was done for the improvement of the national jurisprudence of France: The French lawyers speak in the highest terms of several of his ordinances; and we are assured by them that they contain the wisest and most salutary regulations, methodically and clearly expressed. Certain it is that, in every maritime state of Europe, his *Ordonnance sur la marine*, is read and admired. During the reign of Louis XV. little was accomplished in the prosecution of this object: but, in the early days of the French revolution, its admirers foretold the wonderful improvements which it would effect in government and law. Other constitutions, it was said, had been fortuitously framed; their parts had been composed to meet the present emergencies, and constituted no systematick whole; they contained many discordant principles, many jarring forms, much unmixed evil, some imperfect good, many institutions which had long survived their motives, and many of which reason had never been the authour nor utility the object. The legislators of the revolution were to produce a very different code. *They* were to tolerate nothing of antiquity which reason did not respect; to shrink from no novelty to which reason might lead; to despise narrow coastings,

and to hazard, under the polarity of reason, a bolder navigation; to discover, in unexplored regions, the treasure of publick felicity; and to diffuse it, in their legislative enactments, through every portion of the Gallick empire. Such were the splendid prophecies of the effects of the new jurisprudence; and it is unnecessary to add how little the event corresponded with the prediction.

The fate of the first legislators of the revolution did not deprive them of a tribe of imitators; and the work before us shows that, in the midst of his victories, Bonaparte aspires to legislative fame. We hope that he will deserve it: for we acknowledge our wish that, under his auspices, France may excel in all the peaceful arts, and particularly that his subjects may enjoy every kind of happiness which a permanent system of wise and well administered legislation can confer. Such a wish is not unpatriotick, nor improvident, nor even *ungenerous*: for it is impossible that France should be wise and happy, and her neighbours not be better for her wisdom and her happiness.

The *Code-Napoleon* has just reached us; and we find in it an account of the discussions which took place among the persons, principally consulted in its formation. *Bonaparte* as first consul, takes his share in their deliberations; he is frequently out-voted; and the report does not afford the least ground for supposing that the freedom of debate was checked in the slightest degree, by consular authority. Pliny frequently compliments Trajan on the liberty of speech which the senate enjoyed in his presence; and though between Trajon and *Bonaparte* we can trace little resemblance, yet, from the records of those days and from the volume before us, it is evident that Pliny never spoke nor affected to speak with more freedom before Trajan, than *Tronchet* appears to have debated before *Bonaparte*.

In an early page of the work, a deliberation of some length takes place on the article of the code which "forbids judges to pronounce generally, and by way of regulation, on the causes which come before them." A discussion was thus

induced on the nature of that important and extensive portion of the law of every civilized state, which arises from the opinions delivered by courts of justice, and the consequences deducible from them. The members of the council appear to have taken a distinction between legislative and doctrinal interpretation; and they charge the judges of the old *regime*, with having assumed a right to the former, by extending the operation of the law by their own regulations under the name of *arrets*: but they seem to feel the necessity of allowing to judges a considerable degree of latitude for the doctrinal interpretation of the law. In the course of the discussion, *M. Roederer* asks, if the *civil code* had been wholly silent on the right of aliens to inherit property, to whom it should belong? *M. Tronchet* replies that, by analogy to the general principles of the code, which exclude a stranger from civil rights, the judge should have pronounced him incapable of taking property by descent; and this opinion seems to be generally adopted by the council. We conceive that *M. Roederer* was not very happy in his question: for the moment it is admitted that the law excludes strangers from all civil rights, and that the taking of lands by descent is a civil right, the question is answered. On the whole, considering the importance of the subject, we must express our surprize at the jejune and unsatisfactory manner in which it appears to have been treated.

We are as little edified with the discussion on the effects of civil death. We find it inseparable from capital punishment: but several offences, which are not capital, are punished by civil death; and it then becomes a question with the members of the council, what is to be the fate of the wife and her subsequent children by the husband? is the marriage to subsist? are the children to be legitimate? Some of the members contend that marriage being a civil contract, and civil death being a dissolution of all civil contracts, it must operate to dissolve the marriage, and bastardize the future offspring. Here the *humanity of the first consul* is eloquent. "Society," he cries, "is sufficiently revenged

in the loss sustained by the criminal of all his property and all his other rights. Must the wife also suffer? must she be violently turned away from an union which has identified her existence with that of her husband? The wife would say, "if you had terminated my husband's existence, you would have permitted me to cherish his memory; you suffer him to live, then permit me to comfort him." For acting up to these sentiments you would esteem her virtue; then legalize the attachment which you admire." The harsher sentiment, however, prevails over that of the first consul, and the article stands in these words: "the previous marriage of a person civilly dead is dissolved in respect to all civil effects, and his wife and his heirs are intitled to the same rights and actions as if he were actually dead."

On all points which relate to marriage, we find that the state is every thing, and the church nothing. After two publications of the marriage at a distance of eight days by a publick officer, before the door of the *maison commune*, with several other civil formalities, the parties are again to present themselves to the civil officer, and, in the presence of four witnesses, declare to him their agreement to become husband and wife; then, in the name of the law, he is to pronounce that they are married, to draw up a legal act of the marriage, and to deposit that act in the publick office. *M. Tronchet* proposes that the public officers should read to the couple, the chapter of the code on the duties of husband and wife. The first consul declares his warm approbation of the motion, because the proposed lecture will leave on the minds of the married couple, recollections which will lead them to inquire of the law what should be their conduct when circumstances of difficulty afterwards occur. The consul *Cambaceres* observes that the chapter in question mentions nothing of the duties of obedience and fidelity which marriage imposes on the woman: but the first consul, who is never at a loss on great occasions, immediately proposes that the "civil officer should explain them to her." It must be owned that the "gipsey jargon," as Mr. Burke has somewhere

termed it, of these modern Solons, does not give us an exalted notion of either their wisdom or their philosophy.

It appears that the subject of divorce was much discussed in the council, and finally it was admitted. The husband may claim a divorce for the adultery of his wife, but the wife can only claim it for the adultery of her husband if he has kept a concubine in their house. Either husband or wife is entitled to a divorce if the other has been condemned to an infamous punishment, and mutual and uniform consent to a divorce, expressed in the manner and accompanied by the conditions and trials prescribed by law, is held to afford sufficient proof that the tempers of the parties are incompatible, and that a peremptory cause of separation exists. We must presume that our readers are acquainted with Mr. Hume's essay on this curious and interesting topick, which certainly will not suffer in comparison with any thing contained in the book before us.

The legitimation of children born before marriage, by the subsequent union of the parents, is a subject which naturally attracts an Englishman's attention; since the memorable refusal of the Barons to admit it, when it was pressed on them by the ecclesiastical part of the council of Merton, is always mentioned as a glorious triumph of our ancestors over foreign innovations. The *Code Napoleon* provides that children born before matrimony may be legitimated by the subsequent marriage of their parents, if both parents acknowledge them before the ceremony or in the act of its celebration. It operates in respect to the descendants of such children, if the children die before marriage; and it confers on the issue thus legitimated, all the rights to which they would have been intitled if they had been born after the union.

Our attention was next caught by some pages in which a considerable discussion occurs respecting the law of adoption. We find traces of this practice in the Jewish and Grecian law, and a few faint vestiges of it in the early histories and codes of some of the German nations: but it never made a part of English law. In Roman jurisprudence, it formed

an extensive and important article. It seems to have originated in the wish so common to man at the close of life, of transmitting his property to a person of his own choice, and in some measure continuing his own existence. Among the Romans, it was sometimes practised for very fraudulent purposes, two of which are particularly mentioned by the writers on the civil law; 1st. By the ancient law of Rome, the father of three children had many valuable privileges; and in order to obtain them, a Roman citizen, to whom nature refused children, acquired them by adoption: the law recognized the filiation; and the rights of parentage necessarily followed. 2d. It sometimes happened that the patricians wished to fill offices which were open only to plebeians; and to obtain a qualification for them, they procured themselves to be adopted into a plebeian family; which act engrafted them on that family, and conferred on them its sacred and civil rights. This was one of Clodius's manœuvres in his attack on Cicero. Such motives made the practice frequent among the Romans, but it was viewed with much jealousy: it was conceived that the publick was so much interested in the adoption that the measure was allowed to take place only at the *comitia curiata*; and as the adopted child was entitled to a participation of the sacred rights of the family into which he was received, it became a part of the pontifical law. After the ceremony of filiation was completed, the child was invested with all the rights and obligations of the natural and legitimate offspring of the parent by whom he was adopted: but these privileges were moderated by Justinian who excluded the adopted child from all the obligations of a natural and legitimate child, and from all his rights, except that of succession in cases in which the parent died intestate.

From this short view of the history and law of adoption, it does not appear to be a practice grounded either on the general feelings of human nature, or on any rational rules of artificial society; and as it was wholly unknown to the old French law, it is not altogether improbable that, if the chief

consul had not entertained particular views of his own, it never would have made an article in the *Code-Napoleon*. The discussion of it, however, in the volumes before us, is interesting. *M. Tronchet* observes that he has always been adverse to adoption, and assigns the reason which determined his opinion :

" At first view, (says he) adoption flatters the imagination and the feelings : but in fact, it is merely a fraud on those restraints which the law of France imposes on an unlimited power of the alienation of property ; and it is therefore a real anomaly, and a deviation, without reason, from legal principles. It is an institution neither necessary nor useful ; and it has no other effect than that of flattering the vanity of those who wish to perpetuate their name. The advantage supposed to result from it is the consolation which it seems to hold out to those who are not blessed with children, by affording them a semblance of paternity : but it never can be more than a faint and imperfect imitation of nature ; and it must always be open to this objection, that it destroys the reciprocity of affection, on which the union was founded by converting independence into duty."

He then enumerates the evils resulting from adoption to individuals, and to society at large : observing that

" Persons united by adoption will too frequently experience mutual disappointment. The father will more often resort to it from hatred to his heirs, than from good will to the person adopted ; and thus he will prepare for himself a source of regret more poignant, because it will be irremediable. Suppose a married couple to have no offspring, and to adopt a child that pleases them : one of the couple dies ; the other marries again, and has a child ; it is easily conceived how great will be the regret of the parent for having given a stranger-brother to his real offspring. The father will hate his adopted child, the adopted child will hate his brother, contention will arise, and the peace and harmony of the family will be wholly destroyed. Besides, if a person desire to do good to any child, it is not necessary for this purpose that he should adopt him ; the law leaves enough of his property in his power, to enable him to effect all the good that he can reasonably wish to confer ; and if he should wish to do more, it must be because he is instigated by the vanity of

perpetuating his name, and of leaving to him who is to bear it a fortune that will enable the holder of it to represent him with *eclat*. Such vanity can be tolerated only in the most aristocratick states. The lot of the adopted child will be equally insecure. If the adoption be irrevocable, the child will find himself bound by an engagement which he has not contracted, and to which perhaps he is repugnant; and if it be revocable, so that he can shake off the yoke w[illegible]n he becomes of age, he must of necessity return to his original family. What will he then find in it, but want of wretchedness? for surely it is not intended that his return should have any retro-active effect on the division of fortune and other family arrangements which shall have immediately taken place. With regard to the publick, also, adoption must be attended with equal inconvenience. Should the affileated child have no claims of right on the patrimony of the person who has adopted him, he becomes a kind of equivocal being, a monster in society; he is cut off from his natural family-connections, yet belongs not to the family into which he is adopted. Should he be admitted to all the rights of real children, then the legislator is unjust to the relations of the adopter, as he deprives his natural and real offspring of their legal rights: but, by the law of France, it is not in the power of an individual to take from any citizen his right of succession."

In reply the First Consul says,

"The custom of adoption is so far from being of aristocratick origin, that it is principally provided in republicks, and the modifications with which it is now intended to be sanctioned, harmonize with the order of things long since established in France. With these modifications, it will be a mere transmission of names and patrimony; a species of transmission long in use, and which has never been accused of making the adopted child a monster in the social order of beings. It has been remarked that adoption serves no other purpose than that of gratifying vanity: but it confers more substantial advantages, it procures for old age a greater certainty of support and comfort than that which may be expected from collateral relatives; and it enables the merchant or the manufacturer, who is deprived of children, to create for himself an assistant and a successor. The power of disposing of his property does not, during the life of the testator, form any ties between him and the proposed object of

his bounty. Motives more dignified than vanity may influence his conduct; affection, esteem and sentiment may lead him to the desire of contracting this alliance with a person whom he may consider as worthy of the favour. It effects no change in our morals; while it encourages youth, prepares good citizens for the state, and furnishes supplies for all professions. Much has been said on the probable regrets of the adopting parent: but regret is a possible consequence of all human transactions; we repent of sales, gifts and marriages; yet sales, gifts and marriages are among the ordinary occurrences of life, and are sanctioned and encouraged by law. After all, if a parent should feel himself disappointed in the consequences which he expected from the adoption, he may confine the child to that portion of his property which the law assigns to him. The only remaining argument against adoption is the injury done by it to collateral relatives; but this is not to be taken into account, because the interest of collaterals is of little moment in the eye of the law."

From these discourses, (which we have considerably abridged) the reader will perceive the nature of the arguments used on each side of the question. The opinion of the chief consul prevails; and adoption is received into the code; but under numerous regulations. The adopting parent must be of the age of 50 and be older at least 15 years, than the person whom he adopts. No child, nor any more remote issue of the adopter, must be alive at the time of the adoption; neither can the husband adopt without the consent of the wife, nor the wife without that of the husband; and, except where they both join in the adoption, no individual can be adopted by more than one person. The adopted must have been a continued object of the adopter's bounty and cares for six years immediately preceding the adoption; unless the person adopted has saved his adopter's life, or has rescued him from imminent peril by water or fire. Adoption is not to take place during the adopter's minority; nor between that time and his attaining the age of 25 years, without the consent of both his parents, if both of them be alive, or that of the survivor, if either of them be dead. The adopted person is to remain in his own family, his family-rights

and obligations are preserved to him; marriage between him and his adopting parents and their issue is forbidden; he acquires by adoption no right of succession to the property of the adopter's relatives: but, in respect to that of the adopter himself, he obtains, though the adopter should have afterwards other children, all the rights of a child.

A tribunal of adoption is established; the members of which are required to decide whether all the conditions of the law in respect to this measure have been fulfilled, and whether the person proposed to be adopted has a good character. They must then pronounce whether there be or be not ground for the adoption. After a month's delay their sentence is to be referred to the tribunal of appeal; and, if it be confirmed it is to be inscribed in the publick register of the place at which the adopted is domiciliated. The adoption is then complete.

Such is the actual law of adoption in France; and we join *M. Tronchet* in thinking that it is an anomalous and absurd provision. The restraints imposed on it are very numerous, and must make the instances of it rare. If it had formed a part of the old law, and the use of it had been frequent, we should have regarded the provision respecting it, in the *code Napoleon*, as a legislative sacrifice to publick opinion: but, as it was unknown in the ancient law, we see no good reason for its introduction into the present code. Perhaps, however, as we have before intimated, something more was meant by it than was then intended to meet the publick ear; and the provision was inserted in the code with the view of reconciling the nation to the adoptions which have since taken place in the Imperial family.

On the interesting subject of imprisonment for debt (which as we are happy to observe, now begins to attract in a great degree the general attention of our countrymen) we were rather sorry but not surprized to find no discussion. Creditors are always bound to accept the *cessio bonorum*, under the provision of the law; and the debtor is thus freed from liability to personal arrest, though he is not discharged from the debt.

The work contains very copious and interesting debates on the propriety of giving children a legal right to any portion of the property of their parents; on the effects of voluntary gifts in respect to creditors or purchasers; on the rescision of sales for inadequacy of price; on the publick registration of mortgages; and on several other subjects which come home to an English lawyer: but we have no time at present to furnish our readers with extracts from them.

This publication certainly abounds with curious matters and must interest, in a high degree, all persons who are engaged in any speculations for the amelioration of national jurisprudence. That much in *our* jurisprudence requires emendation seems to be generally acknowledged: that this emendation is an arduous undertaking, and that the rash and the unskilled should be kept from it, are equally true: but that something should be done towards it by the prudent and the wise, is desired by all whom the delay, the expense, and the uncertainty of our present system of law are known. Whenever it is seriously undertaken, it will certainly behove us to avail ourselves of the example and the experience of our neighbours.

We have seen on sale, but we have not been able to procure it, *L'Esprit du code Napoleon*, a work in several volumes highly commended in the *Moniteur*.

(To be continued.)

Biographical.

RIGHT HON. LORD CHANCELLOR ELDON.

(SIR JOHN SCOTT.)

IT is the peculiar praise of the English aristocracy that it is accessible to every class of people. There is no impassable gulph between even the lowest order of the peasantry and the highest rank of nobility. Nothing is required but superiour merit to pass from one to the other.

It is for this reason that the *study of the law* has enriched the English aristocracy with some of its most distinguished ornaments. *Nearly one third of the whole nobility of England are either lawyers or descendants of lawyers.* The constitution reaps a double advantage from this distribution of its honours. In the first place, the laws are doubtless best supported by those who best understand them, or who, even if they have no professional knowledge, have, at least, an hereditary veneration for the means of their elevation. Hence, indeed, the House of Lords has ever been peculiarly considered to be the best guardian of the constitution in general, in the same manner as the popular rights are understood to be the peculiar care of the Commons. It is a second most undoubted good resulting from the same cause, that, under the contemplation of the high honours to which professional excellence may elevate its possessors, the students of the law are encouraged to greater efforts, and these efforts naturally lead to excellence. There are men who would be invincible by money, but who yield to honours. Neither lord Hale, nor lord Coke, nor lord Mansfield, would have

embraced the profession had they not promised themselves more than the bounty of their clients.

These remarks are naturally suggested by the subject of the present biography; who, by superiour industry united to superiour talents, has overcome the obstacles of inferiour station, and raised himself to the highest honours of the state. Something of this, perhaps, may be imputed to fortune; but what is peculiarly his own, is, that he has accomplished this elevation without having become the instrument of a court or minister; that he has *forced his way* by his own talents and owes nothing to the minister of the day, but that he had discrimination enough to discover his own worth, and publick spirit enough to call it into exercise.

John Scott, now LORD ELDON, was born in the town of New Castle-upon-Tyne, about the year 1774. His father, Mr. William Scott was a coal or rather corn-merchant in the same place; but who having a narrow capital, could seldom trade on his own bottom. His chief business therefore consisted in the freight of corn or coals to the metropolis. According to the best accounts he did not succeed, and was never above a very slender mediocrity. His reputation, however, was untainted—he was superiour to his business; and fortune, or rather providence seems to have indemnified him for his own obscurity by the honour of his sons. From the narrow profits of his business he contrived to give his children that education which has been the basis of their greatness. His two sons, John and William, were accordingly sent to a classical school, and as they boarded at home, the expenses were rendered more moderate. There are yet living many respectable tradesmen in New Castle, who remember to have seen the present lord Chancellor, and judge of the admiralty, "with satchel on their backs, and fresh morning face," proceeding from their father's house to the free grammer school.

The progress of the children rewarded the care of their parents. John Scott early distinguished himself for solidity of judgment, and an understanding, which, in proportion to

its slowness, was deep and comprehensive. He is said, therefore, to have learned slowly, but to have learned thoroughly. His attention was always at his command, and once fixed upon an object was irremoveable until he had examined it in all its parts. This is, in fact, the present character of the Lord Chancellor. He is considered at the bar, as he formerly was at school, as possessing a mind more solid than quick; very slow in determining, but always right. We believe that he has never had a judgment reversed. The late preceding chancellor, lord Erskine, was accustomed to say that the house would only lose its time by listening to appeals from the judgment of his predecessor—that they had only one character—they were brought only to gain time, and to run the life of one party against the other.

It was the decided opinion of earl Mansfield, and an opinion recommended by his own peculiar excellence, that no eminence could be expected in the study of the law unless previously laid in classical learning. "It is not sufficient" said his lordship "that the student of the law should understand the *dog-latin* which is used in his profession; this is a jargon, indeed, which has its use, inasmuch as, by long habit it has been brought to convey a precise meaning. The student, if he really aim at excellence, must form his taste and his understanding by the ancient models; it is in these only that he can learn to unite eloquence and reasoning—the utmost powers of the understanding with the discreet use of the imagination. The elements of the law, moreover," says the same authority "are hidden behind a Latin veil, and the most excellent learning must be lost to him who has not skill enough to raise it at his pleasure. Let the law student, therefore, possess himself of this key to ancient treasures."

The father of lord Eldon entertained the same opinion; and though himself a man of narrow learning, spared no efforts to cultivate the understanding of his children. William Scott had a quickness of parts much superiour to his brother, but their father, a man of much natural penetration, was not deceived by this external blazonry; and, if report

may be credited, always predicted that John would be the more eminent. "The county," said he "cannot produce such a boy as John; under that heavy stupid eye and that watery head, he possesses a mind of which the world will hereafter know the worth."

After some years passed by them at the grammar school, in which John Scott obtained most learning, and his brother William, most reputation, their father sent them to the metropolis to be duly entered in the temple.

The name of John Scott appears in the books in the year 1765, but his brother was not entered until the following year.

The two brothers continued to study together in the temple as at school. They lived in the same chambers, and had the same books. Sir William Scott has been heard repeatedly to acknowledge his obligations to the more penetrating judgment of his brother. One thing, indeed, Sir William appears to have learned almost solely from Lord Eldon: we need not say that we here speak of the habit of application. Lord Eldon, during the six or seven years which he employed at the temple, consumed at least six hours daily in the acquisition of professional knowledge. His lordship has subsequently reaped the full advantage of this early application. He now possesses the reputation of being the most profound lawyer on the bench.

It may be thought, perhaps, that the proverbial slowness of his decisions contradicts this assertion. But the point of fact is, that this tardiness is the very effect of the variety of his knowledge. His memory is so stored with cases, that he is perplexed by the multitude of seemingly contrary precedents. He has so many rules before him that he scarcely knows which to apply. He has to seek distinctions in cases exactly similar. If one case alone arose in his *memory*,* he

[* In the zeal of panegyric, the biographer has here mentioned a quality which is highly advantageous to an advocate, and also, though in a less degree, to the judge. It is not his *learning* or *memory*, but his want of judgment, that faculty which compares

would have no difficulty to decide in the moment. His decisions would be more absolute—if his *learning* was more narrow.

In the year 1777, Mr. John Scott was duly called to the bar. He made his appearance in court with more reputation amongst his immediate friends than amongst the bar in general. He was considered by some as an object even of ridicule, for his very attempt to succeed; others, who knew him more intimately, boldly *avowed* his excellence, and predicted that a few years would place him at the head of his profession. Amongst these was Mr. Thurlow, at that time attorney general. He had studied under the greatest pecuniary difficulties. He had supported himself, in common with Burke, by writing for Dodsley. Thurlow, therefore, had a sympathy for Mr. Scott. During an intercourse, at first merely casual, he discovered the talents and acquired knowledge of lord Eldon. This was sufficient for Thurlow, who, in the consciousness of talents, venerated them in others. He immediately cultivated the acquaintance of Mr. Scott; and, by his direct encouragement was the means of introducing him to the world.

Mr. Scott was for a considerable time kept back by his own fault. "Two things" said lord Thurlow "are necessary to a counsel; confidence to push himself on the stage, and learning enough to justify him when he is there." Mr. Scott had a timidity of nature—an aukwardness of address, which kept him in the back ground.

Several years after he was called to the bar, nothing would induce Mr. Scott to push himself into notice; on the other hand, he very patiently suffered himself to be pushed aside.

and discriminates, which embarrasses the Lord Chancellor according to this writer. It would be well if such writers would content themselves with giving *the point of fact*, without attempting to analyze the mind. They are not competent to the task and their presumption generally produces some such bungling as is here exhibited. He seems moreover not to know the difference between learning and memory, or, rather, to think them synonimous terms.]

The remonstrance of his immediate friends, and the encouragement of Thurlow, were equally ineffectual. Under the influence of this natural diffidence, he almost wholly withdrew himself from the courts, and employed himself as a conveyancer or draftsman; a part of the law, which, from its connexion with ancient tenures, has been deservedly the favourite branch of the most eminent lawyers. Mr. Scott advanced his fortune more than his reputation by this practice. He doubtless proved himself the best conveyancer of the day; but this did not satisfy those who knew him likewise to be the best lawyer. They accordingly remonstrated with him, that having so much in his power, he contented himself with so little.

About this time commenced the well known professional jealousy between Mr. Alexander Wedderburne and Mr. Thurlow. Thurlow possessed the more manly mind; Mr. Wedderburne had the talent of application, and the power of retention. Wedderburne was slow, but patient, industrious, examining in detail what he could not comprehend as a system. He overcame every difficulty by his assiduity. His comparative slowness of parts was more than compensated by his superiour industry. Thurlow could have learned more in an hour than Wedderburne in a day, but Thurlow could not be brought to apply himself for the hour, while Wedderburne had no difficulty to study for the day. Wedderburne, therefore, with very inferiour talents, had advanced so rapidly on Thurlow, that it became a doubt amongst the profession which was the best [better] lawyer.

Mr. Thurlow had now an object to accomplish, and he fixed upon Mr. Scott for his means and instrument. He was resolved to bring him forward as a rival to Mr. Wedderburne. Mr. Thurlow had a vanity beneath his acknowledged talents. It was as if he had said, I will bring forward a scholar who shall excel Wedderburne.

Mr. Scott, under his patronage, was soon pushed upon the stage in his own despite. Mr. Thurlow soon afterwards became chancellor, and continued his patronage to Mr. Scott.

Mr. Thurlow is reported to have offered his friend one of the masterships of the court at that time vacant, and which Mr. Scott is said to have declined. It is impossible to conjecture any probable cause for the refusal. It is stated, indeed, that something of delicacy occurred to prevent Mr. Scott from accepting this favour from his patron. It had been previously, we believe, promised to another. Mr. Scott became in a short time well known and much respected as a sound lawyer. Such a reputation is necessarily accompanied by an increasing practice; and Mr. Scott was so fortunate, that in the short space of three years, he is said to have amassed many thousand pounds. His clients were liberal in proportion to the merit of their advocate.

In the year 1783, Mr. Scott obtained a patent of precedency, entitling him to the honours of king's council. In the same year his practice was considered as increasing so fast that he was thought to be in the road of becoming one of the richest men at the bar. His professional success was accompanied by so much prudence and economy, that his expenditure bore no proportion to his income.

In the following year, 1784, the Fox ministry brought in the celebrated India bill, the result of which was, that the king resolved to rid himself of an administration which he suspected to be about to render itself independent of his authority. A difficulty here occurred. No one was willing to encounter the opposition of such a powerful administration. In this state of things, Mr. Pitt became known to his majesty; and as the confidence of this young man was at that period equal to his abilities, he was persuaded to undertake the vacant office.

Lord Thurlow consented to retain the seals; and, in the bustle of party changes, cast his eyes upon Mr. Scott. It was not, however, politically convenient to bring him in either as solicitor or attorney-general; so that his lordship was contented that he should be brought into parliament. Accordingly, in the new parliament, he was elected for the borough of Weobly, in Herefordshire. It was fully understood,

however, that he accepted his seat, conditioning that he should be permitted to vote independently.

The business of the first parliament of the administration of Mr. Pitt was such as required the most powerful talents. It has even been understood that the minister was, during this time, almost solely governed by lord Thurlow; who, upon his own part, is said frequently to have consulted Mr. Scott, and to have derived much assistance from his solid judgment. Mr. Pitt's India bill is understood to have been framed between lord Thurlow and Mr. Scott. Mr. Fox's bill was the most able measure; but Mr. Pitt had entered into office upon the avowed principle, and even positive engagement, of decided opposition to this measure. Mr. Pitt therefore, was compelled to produce something in its stead. He borrowed much of the matter and direct stipulations of Mr. Fox's bill; but, in order that the measure might appear his own, he sometimes departed widely from his original. The consequence was, as might have been expected. It was an expedient of the day.

Lord Eldon is supposed to have had a considerable share in the bill for prohibiting the commercial intercourse of the West India colonies with the United States of America.

The West Indies depend so wholly upon America for their supply of timber and fuel, that the importation of the produce of the colonies had often actually been prevented by the interruption of this supply. The necessary operations of preparing sugar, cotton, &c. require a large stock of wood; and even the largest of the West India islands, Jamaica, is not equal to a tenth part of its own supply.

It was unfortunately represented to the English minister, that the Americans derived considerable profit from this trade; a profit to which their revolt, and subsequent independence had not entitled them. It was added, that the British trader lost in proportion as the American trader gained; that if the woods of Canada, New Brunswick, and Nova Scotia, were fully equal to the supply of the colonies; and that the American trade were prohibited, the English plantations

must necessarily succeed to the supply. Resentment was listened to before prudence; and to avenge ourselves on the Americans, a prohibitory bill almost ruined the colonies.

If this bill had been imputed to Mr. Scott, it is necessary to acknowledge, that the repeal of it is attributed to the same advice. It is, indeed, a part of the character of lord Eldon, that, however, slow in determining, he is never obstinate in his decision—that his mind is open to argument, even after he has declared his opinion—that when convinced of his error, he never hesitates at the acknowledgment—and that he is as anxious to repair the effects of a mistake as others are to conceal it.

When, therefore, the unhappy effects of the American prohibitory bill were made known; when it was found that it had been productive of the most bitter and general distress, Mr. Scott was the first to propose in Parliament, that the obnoxious bill should be repealed. He was here, we believe, in opposition to lord Thurlow, whose firmness too frequently bordered upon obstinacy.

The house, together with the minister were of a different opinion; and concurred with Mr. Scott, that the mischief had been caused by the bill, and that the continuance of it would seal the ruin of the West India colonies. So much attention, however, was given to the pertinacious opposition of Lord Thurlow, that though the bill was repealed, another was substituted in its place, comprehending too many of the obnoxious restrictions. If this subject is again called before the house, we have no doubt that lord Eldon will not disavow, as chancellor, the principles which he so ably supported as Mr. Scott.

The next important business in which Mr. Scott appeared with some eminence, and in which he is supposed to have assisted the minister, was the important subject of the "Irish commercial regulations." This unpleasant discussion, for such it eventually appeared, occupied the attention of the house during two succeeding sessions.

The principles of these resolutions is entitled to the praise of comprehensiveness. It will be found, as may be collected from the resolutions, to be substantially as follows: That Ireland was entitled to a full participation of all the advantages of Great Britain; that, as a sister kingdom, she had a most undoubted right to be put on a fair, equal and impartial footing with Great Britain, in point of commerce; and this, both with respect to foreign countries, and our own colonies: that, in the mutual intercourse between each other, the equality should extend to manufactures, to importation and to exportation: and that, in return for these concessions, Ireland should contribute her full share towards the protection and security of the general commerce.

Throughout the whole discussion of the several resolutions, founded upon the above principle, Mr. Scott distinguished himself by many able speeches; the minister accordingly was considered as regarding him with peculiar favour, and his fortune was already deemed in a fair way of being established.

The Irish resolutions have been much misrepresented in the course of the contests of the two countries. It is impossible, however, that we can deny their being founded upon a principle of equal indulgence and extent, and that the English minister thereby merited, in no slight degree, the gratitude of the Irish nation. Mr. Scott should here come in for his share of praise. But, from some unaccountable cause, the Irish have ever considered the proposed concessions in a very different point of view; and Mr. Scott is accordingly regarded by them as no friend to Ireland. The time, however, may arrive, when that nation may think of him with more justice. Faction is often powerful enough to stifle truth, but, fortunately for the interests of mankind, never wholly to extinguish it.

In the following session, Mr. Scott again presented himself to the attention of parliament, upon the subject of the commercial treaty with France. This treaty, though favourable to England, and not injurious to Portugal, with

some of whose political regulations it interfered, excited alarm in the country gentlemen—an alarm at which, considering the subject at this distance of time, it is impossible to suppress surprise that this nation, so characteristick for its common sense, should have been so egregiously misled.

The opposition, however, availed themselves of the popular prejudices to harass the minister, and the debates were warm, long and personal. Mr. Scott vindicated the treaty with his accustomed solidity of reasoning; and (what in a season of such party heats is much to his credit) the personal attacks of his opponents could never either divert him from his argument or provoke him to personalities. He kept his argument and his temper, in despite of assaults on both.

Parliament and the kingdom were now attracted solely to one point, the impeachment of Warren Hastings. Mr. Scott possessed powers too active not to take a part in this important affair. He spoke on every point, which, in the course of this tedious trial, fell under the cognizance of parliament. It is well known that the most interesting part of the impeachment was the daily contests between the courts of law on the one hand and those of the parliament on the other. The advocates on both sides were the most able men of any time or nation.

Mr. Scott greatly distinguished himself in these discussions. From prejudices natural to a professional man, he was considered as more peculiarly favouring the claims of the courts. It must be confessed, however, that the parliament seemed too much disposed to extend its jurisdiction, and to exempt itself from rules, to which, even as a Supreme Court, it should in natural reason have been subjected. The rules of evidence, and the limitations between what is evidence and what is not, are founded on natural equity; and there is, therefore, no sound reason why, any even Supreme, Court of judicature should adjudge itself above them.

The next business in which Mr. Scott took an eminent part—a part which immediately led to his future elevation—

was the regency. Throughout the whole of this affair the minister is said to have been advised almost exclusively by lord Thurlow and Mr. Scott. It becomes necessary, therefore, to enter some detail upon a subject with which our future historians must connect the name of Scott.

On the 10th December, 1793, the report of the physicians, touching the state of his Majesty's health, was presented to the House of Commons. Mr. Pitt, by the advice of Mr. Scott (now solicitor general) immediately proposed that a committee should be appointed to examine and report all the precedents of the proceedings of former parliaments under circumstances of the interruption or suspension of the royal authority, whether by infancy, sickness or other infirmity.

This committee was accordingly appointed; and the attorney and solicitor general, together with the master of the rolls, were instructed to prepare the required report. Mr. Scott's learning and industry were here peculiarly conspicuous.

On the 12th, the report, which had been prepared, in fact before it was proposed, was proposed to the house. The precedents were chiefly three. The first was taken from the reign of Edward the Third. The parliaments of those days, whether wisely or not, had provided a council about the king's person to act for him. The next precedent was in the reign of Richard the second, when councillors were also appointed to exercise the regal power. The third precedent occurred in the reign of Henry the sixth, during the infancy of that prince. Parliament was then called together by the king's second uncle, the first being still living, but out of the kingdom—and that act was ratified by parliament, this grand council of the nation not deeming it sufficient that it was done by the authority of the duke.

It was contended by Mr. Pitt, Mr. Scott, and the attorney general, that in all these several precedents, the right of supplying the interruption of the royal authority was clearly in the parliament: that the parliament had been invariably consulted, in order to determine what was to be done—that

in the course of their consultations they certainly considered with due respect, the right of the heir apparent—but that the right of the heir apparent required this confirmation of parliament—that parliament, therefore, having a right to reject, confirm, or prefer, had a most undoubted right to modify its trust and obligation.

Upon these principles, Mr. Scott, as solicitor general, was ordered to prepare the act of regency. This act, which was drawn with much ability, empowered his Royal Highness the Prince of Wales, to exercise the royal authority in the name and on the behalf of his majesty, during his majesty's illness, and to do all acts which might be legally done by his majesty. The limitations were, that the care of his majesty's person, and the management of his household, and the direction and appointment of the officers therein, should be in the queen—that the power to be exercised by the prince should not extend to the granting of the real and personal property—to the granting of any office in reversion, or to the granting, for any other term than during his majesty's pleasure, of any pension, or any office whatever, except such as must by law be granted for life; nor to the granting of any rank or dignity of the peerage of this realm to any person, except his majesty's issue who have attained the age of twenty one.

This act was rendered unnecessary by the unexpected recovery of his majesty. The conduct of Mr. Scott, however, during this affair, was no less able than honourable. He afterwards augmented his reputation by his support of the established church, against Mr. Fox's repeated motions for the repeal of the test act.

For these, and other services, Mr. Scott was made attorney general and knighted in the year 1793. The king received him upon his introduction with the most distinguished favour—his majesty seems, indeed, never to have forgotten the staunch friends who adhered to him during that melancholy crisis. Sir John Scott was considered as having become a member of that party, which, from the commence-

ment of the present reign till this time, has retained its original name of the "king's friends."

As attorney general, sir John Scott is regarded as having distinguished himself too much in favour of the prerogative, when it fell to his lot to have the conduct of the prosecutions which the government deemed it necessary to institute against the seditious leaders of the English convention. The times were full of peril and difficulty. A plan was formed to destroy the constitution and the government. That infamous body of men known by the name of the London Corresponding Society, was formed upon the direct plan of the French clubs. The plan was to unite, in the first place, small bodies of men; as soon as they reached a greater number, to divide them into smaller parties; and in this manner (as appeared by their letters and other documents) to spread themselves from town to town, from village to village, and from hamlet to hamlet, till, as they explained it, there should not be an unenlightened man in the whole country.

The proclamation, by which they announced their object, was as singular for its boldness as for atrocity—they candidly avowed their purpose of purifying, as they called it, the representation of the country—openly accused the House of Commons of exercising an usurped authority, and professed their determined resolution to adhere together, and to unite themselves into one firm and permanent body, for the purpose of obtaining an adequate remedy for this intolerable grievance, by corresponding and co-operating with other societies united for the same objects.

Sir John Scott's speech, as attorney-general, was deservedly reputed, as no inconsiderable specimen of his learning and eloquence—some parts of it were peculiarly animated. In describing the Corresponding Society he used the following words:

"You will find them organized, prepared for emergencies and exigencies, relying upon their own strength, and determined to act in combination—in some instances acting with a secrecy calculated to elude observation—in others, pro-

ceeding directly by contrary means to the accomplishment of the same end—representing their numbers as greater than they were, and, therefore, encreasing their number by the very operation of the influence of the appearance of strength. You will find them inflaming the ignorant, under the pretence of enlightening them—debauching their principles towards their country under the pretence of infusing political knowledge in them—addressing themselves principally to those whose rights, whose interests are, in the eye of the law and constitution of England, as valuable as those of any men, but whose education does not enable them immediately to distinguish between political truth and the misrepresentations held out to them—working upon the passions of men, whom Providence hath placed in the lower, but useful and highly respectable situations of life, to irritate them against all that its bounty has blest by assigning to them situations of rank and property; representing them as their oppressors, as their enemies, as their plunderers, as those whom they should not suffer to exist—and (in order at the same time to shut out the possibility of correcting original errour, or rectifying the opinions of those, whom they had so inflamed, misinformed, debauched and misled) not admitting them into these affiliated societies till they had subscribed tests, the principles of which they were not to examine, after they had been admitted."

From some cause or other, to the general surprise of the country, as well as to the disappointment of Government, the several accused persons were acquitted. It seems, indeed, to be the general persuasion, that the ministers had been ill advised when they brought them to trial on an indictment of *treason*. Had they been tried for *sedition*, there cannot be a doubt but that they would all have been convicted; as the papers produced in evidence clearly made out a most atrocious case. The jury, on the other hand, considered it their duty to acquit them of treason.

Sir John Scott continued attorney-general till the administration of Mr. Addington, when he became lord chancellor,

We have before had occasion to mention, that he is regarded as being too tardy in his decisions. This, certainly, is an evil of the first magnitude in a court which is itself but too slow in its process. It must be acknowledged, however, on the other hand, that this tardiness of his lordship is owing to his anxious eagerness for justice. He is unwilling to decide whilst there can be a possiblity of doubt. The tardiness of the decision, therefore, is in some degree compensated by the rare occurrence of any appeal from the judgment when once delivered.

Lord Eldon remained chancellor till the death of Mr. Pitt, when he resigned the seals and was succeeded by lord Erskine.

The discussion of the Catholic question having removed lord Erskine, in common with the coalition administration, lord Eldon was again invited to take the seals; and, we believe, was only induced to accept them, by the particular request of his majesty. Lord Eldon is now considered at the head of his majesty's councils.

The following is no unpleasing specimen of the general style of lord Eldon's eloquence. It is a part of his lordship's speech, on the trial of *Hardy* for treason.

"Gentlemen, it is the great province of a British jury, and God forbid these prisoners should not have the benefit of the reflection, that British juries are able to protect us all; are able to sift the characters of witnesses—to determine what credit is due to them—listening to men of good character without any impression against their evidence—listening to men such as I have stated, with a strong impression against their evidence; that impression, however, to be beat down by the concurrent unsuspicious testimony arising out of the rest of the case, if, upon the whole, you should find the case to be made out as I have stated to you.

"Gentlemen, I forgot to mention to you, that you will likewise find, about the time that this convention was talked of, that there was a new constitution framed for the corresponding society, in which they speak of a royalist as an ene-

my to the liberties of his country—of a democrat as a friend to the liberties of his country; and you will find, that, in a constitution again revised, the whole was thrown into a scheme, and into a system, which was to add physical strength to the purposes of that convention, which was, I submit to you, to assume all civil and political authority.

"If you find all these things, and, if, under the direction of that wisdom that presides here, with respect to which, gentlemen, let me say again, that the situation of this country is indeed reduced to a most miserable one, if the respect, which is due to the administration of the law is suffered to be weakened in any manner, if the respect which is due to the administration of the law, that administration, which, perhaps, is the best feature of the constitution, under which we live, is destroyed, miserable indeed must be the situation of your country! If you find under that direction that the case, being proved in fact, is also made out in law, you will do that on behalf of the publick, which is due to your places, to the publick and to your posterity and theirs.

"But on the other hand, if, after hearing this case fully stated, and attempted to be fully proved, you should be of opinion that it is not proved, or you should be finally of opinion that the offence is not made out according to the *hallowed* interpretation of the statute of Edward III. I say then, in the conclusion, I join from my heart, in the prayer, which the law makes on behalf of the prisoner, God send the prisoner a safe deliverance!"

Lord Eldon, it will not be contested, is signally qualified to preside, as he now does, in the Court of Equity. His legal information is extensive and profound, his attention to cases is vigilant and unwearied, and his attachment to justice is as inflexible as his penetration in the discovery of truth is admirable. This is his praise. He is an honour to the laws which it is his important business to administer.

APPENDIX.

Case arising under the British Orders in Council, and the Navigation Act.

[The following opinion will probably be interesting to our mercantile subscribers and we therefore stop the press in order that it may be inserted in the present number.]

A quantity of American produce has been heretofore introduced and deposited at the port of St. Jago de Cuba, the property of merchants, citizens of the United States.

On Thursday the 21st of September, the Spanish schooner Maria Louisa, Baptiste Michili, master, arrived in Kingston harbour, with a cargo consisting of eighty barrels of herring, one hundred and thirty seven barrels corn meal, sixty seven barrels navy bread, and thirty six barrels pilot bread, on account and risk of Messrs. Joel West and Co. resident merchants of Baltimore, and citizens of the United States of America, consigned to Messrs. Wilkinson and Gilbanks of this city. The bill of lading by which these facts appear, is left herewith.

Upon the arrival of the schooner Maria Louisa, Mr. Gillbanks, one of the consignees, attended at the custom-house, with a manifest in the usual manner, but instead of being permitted to an entry, one of the custom-house officers was sent on board the schooner, who seized her and her cargo, which latter was immediately landed. During the former American embargo, Spanish vessels did import American produce from Spanish ports, and no obstruction was given to that trade.

The seizure of this vessel and cargo, if lawful, is an evil which may be extended to many others under similar circumstances, which are daily expected to arrive in this island, and in consequence of the renewal of the American non-

intercourse, may affect not only the individuals immediately interested, but the community at large, by stopping the means of procuring necessary supplies of such articles, through this channel. Mr. Gillbanks therefore requests your advice and opinion, as well respecting the present seizure, as to what may be done to obviate the evil in future.

Is this vessel and cargo liable to seizure and confiscation, for the breach of any laws or Orders in Council? And if strictly liable to seizure, are there any circumstances or means, by application to the governor or otherwise, to obtain the release of this vessel and cargo? And should she not be liable to seizure, what redress have Wilkinson and Gillbanks, or Joel West and Co. for such seizure? If this seizure is legal, are there any, and what steps can be adopted, to obtain legal permission for the importation into this island, of American produce in Spanish vessels; or such licence as would protect them from seisure whilst so employed?

Your advice generally, on this subject, is required.

ANSWER.

I had some doubts whether this vessel and cargo came under any of the Orders in Council? But upon consideration, those doubts are in a great measure removed. The case is certainly hard, and arises entirely out of the peculiar situation of the commercial relations of the United States.

The question is, whether a Spanish vessel may import a legal cargo belonging to American merchants into a British port in the West Indies.

I am inclined to think, that such a trade is protected by the 2d, 3d, and 4th sections of the Order in Council of the 4th of July, 1808. The 3d section gives all Spanish vessels free admission into British ports, as before the war. The 4th declares, that all Spanish vessels *shall be suffered to carry on any trade, now considered by his Majesty to be lawfully carried on by neutral ships.*

There can be no doubt that this cargo might have been lawfully imported in an American vessel, both under the

Order of Council of the 11th of April, 1808, (which is not repeated by the late order of the 24th of May, 1809) and the existing proclamation. The 4th section, which I have quoted, gives the same privilege to Spanish vessels and neutrals; in both cases, the British almost equally sacrifice the monopoly and carriage of provisions, and it was compelled to do so, in order to induce the Americans to continue the supply, notwithstanding the embargo and non-intercourse laws. It was obvious that this supply could scarcely be carried on in American bottoms, but it might in Spanish vessels, therefore this privilege was confined to the latter—still, however, a doubt remains whether the present Court will consider itself bound by these Orders in Council, which are certainly in violation of the navigation acts, and the validity of which has been questioned more than once by the present Judge.

I recollect a case in which British goods had been imported from this island in an American vessel to Cuba—she was detained and libelled. I considered that both were protected by the Order of Council, of the 11th of November, 1807, which declares that all British manufactures should be restored, on whatever voyage bound, and to whomsoever the property belonged. The Judge took two days to consider the question—and after much hesitation came to this resolution, that his Majesty in council could neither alter nor modify an act of Parliament. The vessel and cargo were condemned. The imperative obligation of these orders is not questioned in the prize court—but that court is especially constituted by his majesty, and in some measure under his controul and will only. If the court decided on the Orders to which I have referred, both vessel and cargo will be acquitted. If, on the navigation act, their fate is inevitable: it is too late now to make any application to the Governor.

(Signed) A. WHYTE.

INDEX

TO THE LAW JOURNAL, VOL. II.

Page.

ADMINISTRATOR. Vide *English Statutes.* - 66, 76

ADDITION. *Ib.* - - - - - - - - - - 69

ADMIRALTY. Vide *Ship, Master, Captors, Seamen,* &c.

ALLUVION, Accroissement and Atterissement, doctrine of - - - - - - - - - - 282, 393

ACTIONS. Vide *English Statutes.* - - - - 71

ADOPTION, French Law of - - - - - - 477

ALIEN. Vide *English Statutes.* - - - 60, 77, 78

ALIENATION. *Ib.*

AMERICAN STATE PAPERS. - - - - - - 1

ARBITRATION. Vide *English Statutes.* - - - 78

ARREST. *Ib.* - - - - - - - - - - 77

APPEAL. *Ib.* - - - - - - - - 59, 63

ASSIZE. *Ib.* - - - - - - 58, 60, 64, 70, 72

ASSYLUM, the right of, relative to fugitive criminals, ceases by the union of the country where the crime was committed to that in which he takes refuge. - - - - 112

ATTORNEY. Vide *English Statutes.* - - - - - 64

BILLS OF EXCHANGE. An action will lie on a Bill of Exchange protested for non-acceptance, although the time for payment be not expired. - - - 235

The *lex loci* is the rule for interest and damages. *ib.*

What damages allowed in South Carolina. - *ib.*

in Massachusetts. - *ib.*

BATTURE AT NEW ORLEANS, discussion of the title of the United States to the - - - - - - 282, 392

BASTARD. Vide *English Statutes.* - - - - - 55

BAIL. *Ib.* - - - - - - - - - - 71, 74

Beyond Sea. Vide *English Statutes.* - - 65, 77
Bond. In a Bond given for the enrollment of a vessel, a condition that she shall not proceed to any foreign port without being duly licenced to carry on the cod or whale fishery, and without obtaining a permit, &c. or without surrendering the certificate of enrollment, is not authorized by the act of Congress, and void. - - - - - - - - - 80
To the *Collector* conditioned for the relanding of the goods in a certain Port or some other Port of the United States, is within the act of 22nd. December, 1807, and valid. - - - - - 457
Biography. Memoirs of Lord Chancellor Eldon. - 484
Canning, Mr. his correspondence with the American government. - - - - - - - - - - 15
Captors, and Prize Agents, their rights and duties 133
Carrere v. Union Insurance Company, reported. 197
Ca. sa, what shall be due diligence in the execution of a 115
Chesapeake, diplomatic correspondence respecting the attack on the - - - - - - - - - - 1
Children. Vide *English Statutes.* - - - - - 78
Manner of adopting, by the Roman law. - 478
by the French law. - 479
Legitimated by the subsequent marriage of their parents - - - - - - - - - 477
Posthumous - - - - - - - - - 78
Champertors. Vide *English Statutes.* - - - 62
Coroner. *Ib.* - - - - - - - - - 57
Courtesy, tenant by the, *Ib.* - - - - - - 55
Cossinage. *Ib.* - - - - - - - - - 59
Conspirators. *Ib.* - - - - - - - - 55
Costs. *Ib.* - - - - - - - - - 71, 76
Corporation. *Ib.* - - - - - - - - - 79
Connecticut. Vide *Promissory Notes.*
Constitution. The Judiciary may decide what is contrary to the - - - - - - - - - 93, 255
Code, quoted. - - - - - - - - - - 355
Cleirac, quoted. - - - - - - - - - 368
Consolato del Mare, translated. - - - 374, 385
Consular Courts, mode of proceeding in the - 385

CREDITORS. Vide *English Statutes.* - - - 76
CUI IN VITA. *Ib.* - - - - - - - - 58
CHARLTON, *Judge*, decision by - - - - 93
CUSTOMS OF FRANCE. - - - - - - 395
DAVIS, *Judge*, decisions by, - - - - 255, 357
DAMAGES. Vide *Bills of Exchange.*
DAY'S ESPINASSE'S REPORTS, reviewed. - - 173
DERNE, case of the, reported. - - - - 129
DERBIGNY'S opinion on the claim of the United States, to the Batture at New-Orleans. - - - - 295
DU PONCEAU'S opinion on the same subject. - - 392
DENIZART, quoted. - - - - - - - 297
DEEDS. Vide *Partner.* - - - - - - 175
Manner of proving in New-York. - - - 458
DOWER, de defensio juris, de finibus levatis, de conjunctim feoffatis, deceit, de medietate, disseisin, demurrer, delay, death, declaration, distress. Vide *English Statutes.* - - - - - - - - 55
DIGEST, translated. - - - - - - - 250, 462
DOMAT, quoted. - - - - - - - - 331
DIVORCE, law of, in France. - - - - - 477
DUMAS, a deserter, case of, reported. - - - 86
DUEL CASE. - - - - - - - - - 117
DESERTERS. Case of Dumas. - - - - - 86
of Roberts. - - - - 192
EMBARGO ACTS. Constitutionality of - - 255
Decisions under the - - - - - 457
Imposed by the Government of the Ensurer and Ensured, is a cause of Abandonment. - - 205
Secus, where the Policy is effected in another Country, from that in which it is imposed and in which the Ensurer resided. - - - - - 237
EDICTS, in France, how promulgated. - - - 321
of Theod. and Valent. quoted. - - - 356
ENGLISH STATUTES. List of those which are in force in Pennsylvania and of those which are recommended to be adopted. - - - - - - - - 51
EQUITY, Power of - - - - - - - - 93
ELDON, LORD CHANCELLOR, Life of, - - - 484
ESPINASSE, DAY'S, reviewed. - - - - - 173

Essoin, entry, executors, execution, exception, embraceors, enrollment. Vide *English Statutes.*
Exercitor. Definition of the Term - - - 465
Forgery. The person in whose name it is committed, incompetent to prove the offence. - - - - - 176
Federalist, quoted. - - - - - - - 266
Felons, fourchers by essoin, fines, fraudulent conveyances, fermors, forcibly entry. Vide *English Statutes.* - 51
French Civil Code, reviewed. - - - - - 472
Laws, how promulgated. - - - - - 321
Guyot, quoted. - - - - - - 324, 6, 9
Gift. Vide *English Statutes.*
Habeas Corpus, in the case of Hippolite Dumas. - 86
Asselin. - - - - - - - - - 101
Emanuel Roberts. - - - - - - - - 192
Hanse Towns, laws of the, quoted. - - - 362
Hall's Admiralty, published. - - - - - 382
Husband and Wife. Vide *English Statutes.*
Heir. *Ib.*
Insolvent. A Deed to I. P. in trust to pay certain creditors in exclusion of others, though executed in consequence of a prior verbal agreement to that effect, is an undue preference within the meaning of the Insolvent laws of Maryland. - - - 184
Law of Pennsylvania. - - - - - - 242
Ingersoll's opinion on the claim to the Batture. - 446
Insurance. Property must not only be accompanied with all the necessary papers to show its neutrality, but must be unaccompanied by any which may give a different appearance. - - - - - 197
Whatever furnishes a pretext for capture and detention, will discharge the underwriters, unless it be one of the risks insured against. - - - *ib.*
Instalment. An incorporated company may elect to forfeit the share of a delinquent Stockholder, or bring suit for the instalments in arrear. - - - - - - - 234
Innkeepers, their responsibility. - - - - - 250
Institutes, quoted. - - - - - - - 331
Infant, inquest, indictment, juror, judgment, joint-tenant, jeofail, judges, justices. Vide *English Statutes.*

JUDGES, their power to decide on the constitutionality of laws. - - - - - - - - - - 93, 250
JUSTINIAN CODE, the common law of Spain.
LAWYER, character of an honest - - - - - 169
LIVINGSTON'S Opinion on the claim of the United States to the Batture at New Orleans. - - - - - 307
LEAP-YEAR. Vide *English Statutes.*
LAWS OF THE UNITED STATES expounded. 81, 255, 452, 457
MADISON'S Correspondence with Erskine, Pinckney, &c. 1
MASSACHUSETTS. Damages on protested bills of exchange in 237
MARRIAGE, laws of France respecting - - - 476
MANSLAUGHTER, master, maintenance, mortgage, mortmain, mispleading, murder. Vide *English Statutes.*
MARINER. The law maritime will not sustain a claim for wages, by the legal representatives of a seaman, beyond the time of his death, when the engagement was by the month. *Qu.?* - - - - - - - - - 359
NANTUCKET BANK VS. GILBERT AND DEAN, reported. 107
NATIONS, Laws of - - - - - - 112, 165
NATERSTROM VS. HAZARD. *Seamen's wages*, reported. 359
NEW-YORK, manner of proving deeds in - - - 458
NON-AGE. Nisi-Prius, non suit. Vide *English Statutes.*
OLERON, laws of, quoted. - - - - - - 363
ORDERS IN COUNCIL, correspondence respecting the - 1
Case of seizure under the, vide *Appendix.*
PARTNER. One partner cannot bind the partnership by deed, though executed in the partnership name. - 175
Partners cannot compel each other to appear in suits, nor represent each other in courts of law. - *ib.*
PARTIDAS, quoted. - - - - - - - 355
PLAINTIFF, paupers, perjury, possession, prisoners. Vide *English Statutes.*
PENNSYLVANIA, list of English Statutes, in force in or recommended to be adopted in - - - 55
Insolvent Law of - - - - - - - 242
PLEAS, sham, - - - - - - - - 116
POTHIER, quoted. - - - - - - - - 296
PINKNEY, WILLIAM, correspondence with Mr. Canning, and Mr. Madison. - - - - - - - 1

PORTALIS, quoted. - - - - - - - 320
PROMISSORY NOTES. Vide *English Statutes.*
In Connecticut are regarded as specialities. - 175
if executed by one partner, in his individual name, though on the partnership account, will not bind the partnership. - - - - *ib.*
PETERS, *Judge*, decision by, quoted. - - - 359
QUO WARRANTO. Vide *English Statutes.*
REPORT of the Judges of the Supreme Court of Pennsylvania, of English Statutes in force in that State. - - 55
REPLEVIN will not lie for goods sold to one who at the time was insolvent and did shortly afterwards stop payment 181
ROBERTS, a deserter, case of - - - - - - 192
RICH VS. PARKER, quoted. - - - - - - 209
REGISTER, see *Ship.*
REVIEW of the Napoleon Code. - - - - - 472
REDISSEISIN, return, record, reversion, rent, recoveries. Vide *English Statutes.*
REGENCY, how regulated in England. - - - 490
STATUTES, see *Report.*
STOCKHOLDER in a road company may be compelled to pay the instalments. - - - - - - - - 234
SOUTH CAROLINA, Bills of Exchange in - - - 235
SEAMEN, how far liable to contribute for damage arising from negligently unloading. - - - - - 239
Representatives of deceased, cannot claim wages beyond the period of the death. - - - 359
STABLE KEEPERS. Their responsibility by the Civil Law. 250
SPAIN. Law of Alluvion in - - - - - - 282
SOCAGE, sheriff, star-chamber, surgeons, servants. Vide *English Statutes.*
SHIP-OWNERS, their responsibility by the Civil Law. 462
TAIL, tenant in, vide *English Statutes.*
TILGHMAN, *Judge*, decision by - - - - - 86
TURNPIKE. Vide *Stockholder.*
The Legislature may prescribe the manner in which land may be taken by a company to make a road. 88
If the Company tender a compensation agreeably to the law, it is trespass in the owner to obstruct the road. - - - - - - - - - *ib.*

VESSELS, enrollment of - - - - - - - 80
VALIN, quoted. - - - - - - - - - 364
VOUCHERS, vicontiels, verdict, vi et armis. Vide *English Statutes.*
UNITED STATES v. SMITH, ET AL. reported. - - 456
Same v. Brig Little Ann. - - - - 457
Same v. Sloop Polly and Jane. - - - 458
Laws of, expounded. - - - - - - 81
WAGES. Vide *Seamen.*
WASHINGTON, *Judge*, decision by - - - 359
WISBUY, laws of, quoted. - - - - - 362
WITNESS. Vide FORGERY.
WIDOWS. Waste, writ of right, of latital, of error, warranty. Vide *English Statutes.*